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NON-UCC STATUTORY PROVISIONS AFFECTING WARRANTY DISCLAIMERS AND REMEDIES IN SALES OF GOODS

DONALD F. CLIFFORD, JR.*

Although the Uniform Commercial Code is multifaceted and comprehensive in many respects, Article 2 of the Code virtually ignores consumer sales problems. Once states began enacting the Code there was great reluctance to tamper with the original creation. The states were left to fend for themselves in addressing sellers' warranty disclaimers and consumers' remedies. In this Article, Professor Donald Clifford examines the state and federal non-UCC attempts to fill in the gaps in Article 2 and protect consumers from warranty limitations and disclaimers.

Professor Clifford notes that state treatment of this issue falls generally into three categories: Those states whose statutes are patterned after the National Consumer Act, which imposes a total ban on the exclusion, modification, or limitation of implied warranties and remedies for breach of those warranties; those states that enacted statutes similar to California's Song-Beverly Act, which deals also with disclaimer problems and requires warrantor to honor express warranty obligations; and those states that merely have regulated the process and form of warranty disclaimers and have insisted on actual communication of limitations to the consumer. Professor Clifford discusses the federal Magnuson-Moss Warranty Act in less detail, concluding that it has impeded rather than fostered effective enforcement of the state statutes.

In a separate section, this Article examines case law construing these statutes, providing a judicial as well as legislative look at this unsettled area of the law. Professor Clifford concludes by evaluating the impact of the state statutes and examining the lessons to be learned from their treatment of Article 2 deficiencies. These lessons should prove useful to state reformers as well as the committee that is currently at work on revising Article 2.

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I. INTRODUCTION

In view of the comprehensive work done in recent years to amend most articles of the Uniform Commercial Code (UCC) and even to draft entirely new ones,¹ it is not surprising that official attention now has turned to Article 2. After all, Article 2 has survived virtually intact for four decades. In 1988, a Study Group was appointed to "consider whether Article 2 should be revised and, if so, to report on what revisions might be required."² The Group issued a Preliminary Report in 1990 and an Executive Summary in 1991, recommending that Article 2 be revised.³ The drafting committee was duly appointed and is now at work.⁴ Among the numerous and complex issues facing the revisors is the fundamental question of whether special provisions should be made for consumers.

The preliminary report of the Article 2 study group originally recommended that the revised sales law be "neutral" as to consumer issues.⁵ Apparently in response to strong criticism of that view,⁶ the Final Report indicated a much more open attitude. In addition to recommending that

1. For a brief description, see Frederick H. Miller et al., *Introduction to Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 BUS. LAW. 1449, 1449-54 (1991).

2. A.B.A. Task Group, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 988 (1991) [hereinafter *Preliminary Report*].

3. PEB Study Group, *Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1869-81 (1991) [hereinafter *Executive Summary*].

4. Amelia H. Boss & Patricia B. Fry, *Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law*, 47 BUS. LAW. 1505, 1508 (1992).

5. The "conceptual and practical" reasons for this conclusion "include the notion that Article 2 is, primarily, a commercial statute, the fact that the history of consumer protection law reflects local, nonuniform development, and the belief that a more inclusive approach would impair the changes for approval and ultimate adoption of any revised Article 2." *Executive Summary*, *supra* note 3, at 1876. The background of the appointment and work of the group is reviewed in *id.* at 1870-71.

6. The *Executive Summary* cited in particular the "critical comments of Professor David Rice." *Id.* at 1876 n.15. My own preliminary views of why the revised Article 2 should include express consumer provisions appear in the ABA Task Force Report. In summary, they are: (1) The Code, despite the absence of express consumer provisions, presently applies to consumer transactions, successfully tempting courts to fashion rules which only uneasily fit commercial cases; (2) "There is not available a viable package of non-U.C.C. law to resolve consumer sales law problems"; (3) Although the federal Magnuson-Moss Act does not purport to create national consumer sales law, it does preempt some UCC privity and disclaimer of warranty provisions in transactions involving consumers with the result that Article 2 is no longer an accurate statement of the law on those subjects; (4) Both markets and marketing have changed materially since the enactment of the Code; and (5) The current Article 2 literally does not cover the most prevalent form of sales warranty—the manufacturer's warranty—which passes through the distribution process directly to the consumer. *Preliminary Report*, *supra* note 2, at 1002-09, 1103-05 (1991).

the revision be consistent with the substantive and disclosure rules of the Magnuson-Moss Warranty Act (Magnuson-Moss) regarding implied warranties,⁷ it urged "that a more systematic study of state and federal consumer developments be undertaken. Such a study might yield solutions which are transferable to non-consumer transactions or, perhaps, identify specific provisions that should be incorporated into Article 2 for consumer transactions."⁸ This Article is a partial response to one aspect of that invitation.

One looking for statutory provisions protecting consumers from abuses in consumer sales transactions might as well use a kaleidoscope as a telescope or a microscope. The much mottled picture is a virtual Jackson Pollock product of drippings from a wide variety of federal and state statutes, tinted with contrasting shades of judicial interpretations, and washed in parts by some peculiar disclosure provisions of the Magnuson-Moss Act. There is, of course, an appropriate place for abstract art. It is not, however, in an area of the law that applies so many times to so many people.

There are a number of reasons why there are not more recognizable forms in the picture. The first, of course, is that the UCC took a hands-off approach to consumer sales problems. This was exacerbated by strong reluctance to tamper with that glorious creation after state enactments had begun for fear of impairing the uniformity which our increasingly national markets required. Thus, although the Permanent Editorial Board, responding to nonuniform amendments adopted in some states and other pressures to lower the privity barrier, set forth three alternative versions of Section 2-318 in 1966,⁹ the Article 2 warranty provisions have survived since original enactment relatively un-

7. *Executive Summary*, *supra* note 3, at 1879. One recommendation appears to go even further. It is that "the implied warranty of merchantability should not be disclaimable under § 2-316(2) when the seller makes a written warranty that is subject to MMWA [Magnuson-Moss]. This is the effect under federal law and there is no good reason why state law should not be the same." *Id.* As a technical matter, § 108 of Magnuson-Moss prohibits disclaimer only in the event of what is known as a "full" warranty under that Act. In the case of all other ("limited") warranties, merchantability may be limited to the duration of an express warranty if conscionable and the duration of the express warranty is reasonable. It is clear, however, that the Study Group's recommendation taken in full context did not contemplate the "full" warranty absolute disclaimer ban approach since its next recommendation regarding disclosure obligations refers to a written warranty "which disclaims or limits warranties." *Id.* In short, the Group's recommendation is that the Article 2 revision should be consistent with the Magnuson-Moss rules regarding disclosure and disclaimer of implied warranties.

8. *Id.* at 1878.

9. The original provision was designated as Alternative A. It is not always realized that these alternatives were set forth *after* the Code had been enacted in a number of jurisdictions. Consequently, it has been difficult to gauge the significance of how many states have adopted one or another of the alternatives. In some states, a conscious choice was never made.

scathed.¹⁰ At the outset, there was also hope that consumer interests could be advanced by using the new disclaimer safeguards and the more refined remedial provisions. Perhaps the new Code would work!

Other developments on two different fronts absorbed consumer advocacy resources during the early post-UCC period. The first was the explosion of activity to deal with the brand new and rapidly expanding universe of consumer credit. These developments came at both the federal and state levels. In 1968, Congress launched a decade of credit-related legislation beginning with the Truth-In-Lending Act.¹¹ During the same period, states' focus on consumer credit took the form of revitalizing and updating retail installment sales acts. Attempts to achieve uniformity in these developments resulted in two versions of the Uniform Consumer Credit Code (U3C) and the consumer advocate sponsored National Consumer Act (NCA, whose revision took the name Model Consumer Credit Act (MCAA)).¹² None of the efforts to unify state laws took firm hold, although each had considerable influence in a small number of states and small influence in others.¹³

The second development was the advent of state laws dealing with unfair and deceptive acts and practices, which hereinafter are referred to occasionally as UDAP. This movement was encouraged during the 1960s by the Federal Trade Commission (FTC), which collaborated with the Council of State Governments to produce a Uniform Act¹⁴ that contained alternative approaches centering around the prohibition in Section Five of the Federal Trade Commission Act against "unfair methods of

10. The original § 2-316 also was changed, but this occurred so early in the process of state enactment that the original version had almost no impact. See *infra* note 86.

11. The additions were the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act and, finally, the Electronic Fund Transfer Act. They all appear under the umbrella of the Consumer Credit Protection Act. 15 U.S.C. §§ 1601-1693r (1988).

12. The history of these Acts is discussed briefly at *infra* note 20.

13. According to one consumer law casebook, the U3C has been adopted—although with nonuniform variations—in Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah, and Wyoming. The National Consumer Act "provided much of the substance of the Wisconsin Consumer Act and piecemeal amendments to other consumer laws. Perhaps more important, Iowa, Maine, South Carolina and West Virginia each have enacted hybrid versions containing some U3C, some MCCA, and some local variants." JOHN A. SPANOGLE ET AL., CONSUMER LAW CASES AND MATERIALS 5 (2d ed. 1991).

14. This uniform act is the Uniform Trade Practices and Consumer Protection Law of 1967 and its revision in 1970. The Uniform Deceptive Trade Practices Act promulgated in 1966 also qualifies generically as state legislation dealing with deceptive trade practices. However, that Act originally was intended as a remedy for business competitors and did not provide for a consumer cause of action or state agency enforcement. It was supplemented in most of the 13 adopting states by a second statute that provided more comprehensive remedies. See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.02[2][b] (1991).

competition and unfair or deceptive acts or practices.”¹⁵ State enactment split among two of the options set out in the Uniform Act¹⁶ and a third mode not based on it.¹⁷

Two important points may be made about the relevance to consumer sales warranty law of these two significant and successful state consumer law reform efforts. Neither touched directly on the failure of Article 2 to confront consumer sales law problems, and both involved unsuccessful attempts to achieve uniformity. The consumer sales law warranty issues thus were not affected directly by these movements, and those active in the efforts toward uniformity may well have concluded that such activity on consumer issues was futile.¹⁸

Still another reason for state inactivity on the consumer sales warranty front was the rumbling from Washington about new federal legislation. In 1967, warranty legislation was introduced in the Senate, and a series of studies on consumer product warranties was begun, resulting in 1975 in the Magnuson-Moss Act.¹⁹ During this time, those interested in state law changes might well have thought it prudent to “wait and see.” In light of all of these factors, it is not surprising that there was no concerted activity at the state level to “consumerize” sales warranty law. What is surprising is that some states undertook the task at all. Moreover, some of those efforts have persevered for several decades and influ-

15. The FTC considered state legislation desirable because there was no private cause of action for violation of the federal Act, and the nature and number of the problems clearly was beyond the enforcement capacity of the federal agency. *See generally* PRIDGEN, *supra* note 14, § 3.02 (explaining the origins of the state acts).

16. One authority noted that 20 states have adopted the “little FTC” model based on the prohibition of the Federal Act and that 26 have adopted the “laundry list” alternative, which, in addition, proscribes 13 described practices. *Id.* Jonathan Sheldon, in NATIONAL CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 3.4.1.2.1 (3d ed. 1991), has a slightly different breakdown and hence different numbers. Both works have comprehensive and useful appendices containing the citations and a topical analysis of the statutes. Affixing the numbers is also complicated by the fact that some states have incorporated elements of more than one approach.

17. The statutes in this group are often called “consumer fraud acts.” Although not based on one of the Uniform Act alternatives, their approach is similar to the “little FTC” Acts, absent any reference to unfair methods of competition. Pridgen and Sheldon agree that seven states have taken this approach.

18. Those warriors in the National Conference of Commissioners on Uniform State Laws must have felt this rather deeply, given the fractious reception to the U3C noted above and the virtual nonreception of the 1971 Uniform Consumer Sales Practices Act. The latter was an attempt to provide uniformity in approaching those matters covered by the little FTC acts. It was adopted only in Kansas, Ohio, and Utah. *See* NATIONAL CONSUMER LAW CTR., *supra* note 16, § 3.4.1.2.2; PRIDGEN, *supra* note 14, § 3.02[2][e].

19. For a useful capsule of the history of this Act, see BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES § 14.02 (1984).

enced the shape of the Magnuson-Moss Act, the recent wave of state motor vehicle lemon laws, and some mobile home statutes.

The statutes came in various sizes and shapes. Despite their variety, they do show some consistent patterns of concern about the inadequacies of the current Article 2. They also have served as very useful experiments of ways to respond to those concerns. These statutes are occasionally referred to in this Article collectively as "the special statutes."

This Article is subdivided to illustrate both the types of statutes adopted and the underlying issues addressed. Categorizing the provisions of individual states is fairly accurate on a generic basis, but there are, of course, individual variations and exceptions.

Since case law construing statutes tends to be episodic and piecemeal, I found it more valuable to discuss the statutes directly with only brief reference to the case law. At the same time, thorough evaluation requires access to the train of litigation within specific states. Therefore, the case law is discussed in detail on a state-by-state basis in a separate section.

As will be seen, some of the special statutes focused on discrete issues; others covered a wide range. Various issues were treated in different combinations. The changes were accomplished in some states by amendments to Article 2. In others, they were incorporated into other consumer legislation, occasionally as a separate chapter. Many of the statutes fit loosely into two prototypes: The National Consumer Act (NCA) and California's Song-Beverly model. Both came to fruition at about the same time in the early 1970s. A smaller number of states adopted provisions dealing solely with the form and process of disclaimer of implied warranties. Each of these approaches is examined separately.

The most widely adopted features of the NCA are a total ban on the exclusion, modification, or limitation of the implied warranties of merchantability and fitness for the particular purpose and any remedies for breach of those warranties. Adoption began in Massachusetts in 1970 and followed in Connecticut, Maine, Vermont, Maryland, the District of Columbia, West Virginia, Kansas, Mississippi, and, with respect to personal injuries only, Alabama. This Article, at various points, refers to these as the "total ban" states.

The Song-Beverly Act, discussed in Section V, also dealt with disclaimer problems. More importantly, its point of departure was requiring warrantors to honor their express warranty obligations by enlarging on UCC remedy provisions and imposing new disclosure and remedial duties. These were emphasized by the threat of both attorney fees in all cases and treble (later lowered to double) damages for willful violations.

The California model appears to be the basis for provisions in Minnesota, New Hampshire, Oregon, and Rhode Island, although none of those states attempted to follow the entire Song-Beverly scheme, and some borrowed only the conditions for disclaimer of the implied warranties. More notably, some of the Act's features were carried over into the federal Magnuson-Moss Act and the more recent automobile and manufactured home lemon laws.

Statutes in a number of other jurisdictions are not rooted in either model. Those considered below deal principally with the process and form of disclaimers and insistence on conduct that will require actual communication to consumers if reasonably expectable terms are not to be in the contract. No effort is made to discuss special privity or product liability statutes that have already been widely analyzed. Only brief consideration is given to the UDAP Acts and lemon laws.

The federal Magnuson-Moss Act is not analyzed in great detail. However, some of its elements are considered because of the ways they intersect with state law. In addition, in several places the text will indicate my strong suspicion that there would have been more successful litigation under the special state legislation considered here if regulations promulgated pursuant to the Magnuson-Moss Act had not prevented it. My concern about this is addressed briefly in section VI.

The final section briefly evaluates some of the developments that have obscured the pressing need for Article 2 reform on consumer matters and diminished the visibility of the special statutes. It then looks to the special statutes individually and collectively for indications of common perceptions of problems in Article 2 as it applies to consumer transactions. Some significant problems emerge. There also appear some common grounds in these diverse statutes for some of the solutions. I have not attempted to crystallize all the wisdom of the different approaches into a single ideal proposal. Rather, it seeks to identify some general patterns of need and response. It should become clear that some of these time-tested approaches are available as appropriate options for those involved in the give and take of the drafting process.

II. THE TOTAL BAN APPROACH

The first approach to overcoming the failure of Article 2 to cope with consumer warranty and remedy problems was simple and direct: It banned limitations on warranties and remedies. A convenient reference point for the statutes that took this approach is the sales article of the National Consumer Act. The National Consumer Act was the 1969 product of a national conference of consumer advocates who sought sub-

stantial revision of the 1968 Uniform Consumer Credit Code (U3C).²⁰ Although the U3C did not deal with sales warranty issues, the NCA drafters included a brief Article on Sales on the premise that "since many credit transactions are in fact sales of goods, there is need to afford the consumer additional warranty protection."²¹ Despite their modest origin as a by-product of dissatisfaction with the proposed consumer credit law, the sales provisions were directly or indirectly influential in a number of states.

The centerpiece of the National Consumer Act is its ban on warranty and remedy limitations. It fits neatly into a single brief section:

Notwithstanding any other provisions of law, with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall:

(1) Exclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or

(2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied.²²

A. *Ban Against Limitations of Implied Warranties and Remedies for Their Breach*

The prohibition against limitations of implied warranties and remedies for their breach has been the NCA's most widely followed provision. It appears in the District of Columbia, Maine, Massachusetts, Vermont, and West Virginia.²³

20. The U3C originally was approved by the National Conference of Commissioners of Uniform State Laws in 1968 in a form that alarmed proponents of consumer interests. They in turn set forth their own vision of a model act in the National Consumer Act in 1969, the product of a national conference co-sponsored by the then recently formed National Consumer Law Center and the National Legal Aid and Defender Association. The Center was asked to do the actual drafting with the aid of other experts willing to assist. See NATIONAL CONSUMER ACT prefatory note (First Final Draft 1970); Vincent P. Cardi, *The West Virginia Consumer Credit and Protection Act*, 77 W. VA. L. REV. 401, 408-09 (1975). This provoked some response in the 1974 revision of the U3C and a revision of the National Consumer Act under the new title of the Model Consumer Credit Act. UNIF. CONSUMER CREDIT CODE, 1974 Act, prefatory note, 74 U.L.A. 2-3 (1985).

21. NATIONAL CONSUMER ACT § 3.201 cmt. 1 (1970). In the same vein, the drafters proscribed a laundry list of unfair or deceptive sales practices, noting that "the draftsmen of the Credit Code completely ignored the fact that these practices often accompany credit transactions." *Id.*

22. *Id.* § 3.302.

23. D.C. CODE ANN. § 28:2-316.1 (1991); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 106, § 2-316.A (West 1992); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1992); W. VA. CODE § 46A-6-107 (1992). Other states have adopted

The total disclaimer ban makes a strong statement of public policy²⁴ and rules out the use of many commonly used clauses. The range of possible applications is only suggested by the decided cases. Among the contract provisions held invalid under total disclaimer bans are: "as is" clauses,²⁵ clauses providing that an express warranty is in lieu of all other warranties both express and implied,²⁶ provisions limiting the duration of merchantability to that of the express warranty,²⁷ "50-50" warranties in which the buyer is to pay half the cost of any repairs during the warranted period,²⁸ and attempts to confine consumers to warranty claims against distant component suppliers.²⁹

One court has held also that the ban makes inapplicable the waiver by inspection provisions of UCC Section 2-316(3)(b).³⁰ The disclaimer ban provisions also have been applied to a "two party equipment lease" that was held to be the functional equivalent of a sale,³¹ and, in a state in which the ban also applies to services, to a fire and burglar alarm system.³² Another court found the public policy underlying the disclaimer

similar limitations with some variations. See ALA. CODE §§ 7-2-316(5), -2-719(4) (1984); CONN. GEN. STAT. ANN. § 42A-2-316 (West 1990); KAN. STAT. ANN. § 50-639(A) (1983); MD. CODE ANN. COM. LAW I § 2-316.1 (1992); MISS. CODE ANN. § 75-2-315.1 (Supp. 1988).

24. This has been noted with particular vigor in *Lectro Management, Inc. v. Freeman, Everett & Co.*, 135 Vt. 213, 216, 373 A.2d 544, 546 (1977), and *State ex rel Tierney v. Ford Motor Co.*, 436 A.2d 866, 872 (Me. 1981).

25. See, e.g., MISS. CODE ANN. § 75-2-719 (1972); *Maryland Indep. Auto Dealers v. Motor Vehicle Admin.*, 41 Md. App. 7, 10, 394 A.2d 820, 822 (1978); *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725, 728 (Miss. 1991); *Beck Enters. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987).

26. See, e.g., *Stair v. Gaylord*, 232 Kan. 765, 776, 659 P.2d 178, 187 (1983).

27. See, e.g., *Patton v. Chrysler Motors Corp.*, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1041, 1043 (D.C. Super. 1990); *Fedders Corp. v. Boatright*, 493 So. 2d 301, 303, 308 (Miss. 1986).

28. See, e.g., *Maryland Indep. Auto Dealers*, 41 Md. App. at 7, 394 A.2d at 822.

29. See, e.g., *Stair*, 232 Kan. at 771, 659 P.2d at 184. The same court cast doubt on whether the holding would survive a new product liability act provision that excuses a seller from liability for a product manufactured elsewhere if the seller had no knowledge of and could not have discovered the defect while exercising reasonable care. *Id.* at 771, 659 P.2d at 184.

30. *Christie v. Dalmig, Inc.*, 136 Vt. 597, 599, 396 A.2d 1385, 1387 (1979).

31. *Briscoe's Foodland, Inc. v. Capital Assocs.*, 502 So. 2d 619, 621-22 (Miss. 1986). Several of the total ban statutes apply expressly to leases. See, e.g., KAN. STAT. ANN. § 50-624(c) (1983); MD. CODE ANN., COM. LAW I § 2-314(4) (1992); W. VA. CODE § 46A-6-109(a) (1992).

32. *Corral v. Rollins Protective Servs. Co.*, 240 Kan. 678, 693-94, 732 P.2d 1260, 1270-71 (1987). In a later case, the court indicated that the holding may no longer apply. See *infra* discussion accompanying notes 276-77. In another total ban state, a court found it unnecessary to decide whether the disclaimer ban applied to a burglar alarm protection system because the transaction did not involve "consumer goods," inasmuch as plaintiff was a corporation engaged in business. *New England Watch Corp. v. Honeywell, Inc.*, 111 Mass. App. Ct. 948, 948, 416 N.E.2d 1010, 1011 (1981).

ban persuasive in determining whether a mixed goods and services transaction was subject to UCC Article 2 warranties.³³

Several cases illustrate the important point that since the implied warranty of merchantability may not be disclaimed, it may extend beyond the duration of an express warranty.³⁴ In a used car case invoking that rule, the Kansas Supreme Court emphasized that the warranty of merchantability contemplates that a used car will not last as long as a new one.³⁵

The ban in these states against remedy limitations has been invoked in surprisingly few cases. It has been construed to invalidate copayment provisions,³⁶ a clause limiting recovery to \$250,³⁷ and to raise some doubt about the validity of a requirement for arbitration.³⁸ The ban against remedy limitations for breach of implied warranties does not reach limitations in service contracts that provide "extra benefits in addition to the implied warranties."³⁹ On the other hand, a contractual limitation on remedies for breach of express warranty cannot affect recovery under an implied warranty theory.⁴⁰

Several reasons may account for the scarcity of case law in this area. The motor vehicle lemon laws that have so rapidly evolved in the last decade may have absorbed some of the cases. Those laws, although working within finite time lines, provide more specific and stronger remedies than available under the special provisions or the UCC. Consumer lemon cases litigated under the UCC also have evolved to provide consequential damages even in the face of contractual provisions that bar them. Thus, it is possible that those litigating over lemons have used the format which has developed everywhere.⁴¹ That is, however, a tortuous path that runs from failure of the essential purpose of the standard limited remedy of repair and replacement clause to the consequent availability of Code remedies. These remedies in the consumer cases often

33. *Pools v. Sheehan*, 295 Md. 285, 297, 455 A.2d 434, 440-41 (1983).

34. *See, e.g., Patton v. Chrysler Motors Corp.*, 14 U.C.C. Rep. Serv. 2d (Callaghan) 1041 (D.C. Super. 1990); *Dale v. King Lincoln-Mercury, Inc.*, 234 Kan. 840, 676 P.2d 744 (1984).

35. *Dale*, 234 Kan. at 844, 676 P.2d at 748.

36. *Beck Enters. v. Hester*, 512 So. 2d 672, 678 (Miss. 1987) (by implication).

37. *Corral v. Rollins Protective Servs. Co.*, 240 Kan. 678, 693-94, 732 P.2d 1260, 1271 (1987).

38. *Hannon v. Original Gunitte Aquatech Pools, Inc.*, 385 Mass. 813, 824, 434 N.E.2d 611, 617-18 (1982) (raising question but not answering it definitively).

39. *Farrell v. General Motors Corp.*, 249 Kan. 231, 240-41, 815 P.2d 538, 546 (1991).

40. *See Stark v. Patalano Ford Sales, Inc.*, 30 Mass. App. Ct. 194, 202 n.5, 567 N.E.2d 1237, 1242 n.5, *appeal denied*, 409 Mass. 1105, 571 N.E.2d 28 (1991).

41. *See Bostic v. Mallard Coach Co.*, 185 W. Va. 294, 296, 406 S.E.2d 725, 726 (1991); *Adams v. Nissan Motor Corp.*, 182 W. Va. 234, 239, 387 S.E.2d 288, 291-93 (1989).

involve a routine award of consequential damages without bothering about an inquiry, required in some commercial cases, whether the exclusion of consequential damages is unconscionable.⁴² Clearly, the remedy ban is a neater, cleaner, and easier means to that end. Circumventing the undue complexity of the Code remedy process is also a feature of motor vehicle and manufactured home legislation.

B. The Prohibition of Limitations on Express Warranties and Remedies for Their Breach

The NCA disclaimer prohibition not only catches in its wake limitations on implied warranties and remedies for their breach, but it also removes impediments to proof of oral express warranties and proscribes limitations on remedies for their breach.

1. Limitations on Disclaimer of Express Warranties

The express warranty disclaimer prohibition seems designed to end the curse of the parol evidence rule, which may (but need not inevitably) operate to keep evidence of oral warranties from the jury. It presumably would block the operation of standard merger clauses that purport to integrate an agreement with respect to written warranties so as to exclude proof of any other warranties. Less clear is its application to clauses that seek to limit the authority of agents to bind the principal and declare oral agent representations off limits.

This NCA provision has survived unscathed only in West Virginia.⁴³ Just why it was not adopted elsewhere is not clear. Perhaps it was considered unnecessary in view of UCC Section 2-316(1), which appears to provide that limitation of an express warranty is "inoperative."⁴⁴ Certainly, as a general proposition, "the concept of prohibiting any exclusion, modification, or limitation of an express warranty does appear to be a contradiction in terms."⁴⁵ The objection of Kansas car dealers to the provision that originally had been adopted in that state may also have existed in other states: Concern that the language "might automatically invalidate written express warranties that were limited in duration."⁴⁶

42. See *Volkswagen of Am. v. Novak*, 418 So. 2d 801, 803-04 (Miss. 1982). But see *Schurtz v. BMW of N. Am.*, 814 P.2d 1108, 1115 (Utah 1991) (holding that the trial court must determine whether the contractual limitation of consequential damages is unconscionable and must support its determination with specific findings of fact).

43. W. VA. CODE § 46A-6-107 (1992).

44. See U.C.C. § 2-316(1) (1989).

45. Barkley Clark & Michael J. Davis, *Beefing up Product Warranties: A New Dimension in Consumer Protection*, 23 KAN. L. REV. 567, 595 (1975).

46. *Id.* The provision was eliminated in 1974 "as creating a needless ambiguity." *Id.*

Both objections seem unfounded. The UCC Section 2-316(1) provision is expressly subject to the parol evidence rule, which is sometimes leveraged to exclude the admission of evidence of oral warranties.⁴⁷ The NCA provision appears to be a neat and direct way to circumvent that problem. The concern that the language would preclude express warranties limited in duration seems purely formalistic. On the other hand, the concern of the Kansas car dealers that the provision would also constrain contractual limitation of remedies for breach of express warranties is rooted in a correct interpretation of the Act. It clearly was designed to reach that result. And, as indicated below, four jurisdictions chose to proscribe limitation of remedies for breach of express warranties without dealing with the disclaimer issue.⁴⁸

2. Two Approaches Toward Circumscribing Limitations on Remedies for Breach of Express Warranties

A total ban against limitation of remedies for breach of express warranty has been part of the West Virginia package from the outset and was incorporated by Mississippi in 1987. However, Maryland, in 1971, enacted a prohibition effective against those manufacturers who did not provide "reasonable and expeditious means of performing the warranty obligations."⁴⁹ The District of Columbia copied this provision in 1982.⁵⁰ Massachusetts, which had in 1971 adopted the central features of the NCA except for the ban on express warranty provisions, followed Maryland's lead in 1973 with the further condition that the manufacturer's means of performing obligations be "within the commonwealth."⁵¹

These small provisions stand in contrast to the very strong focus on express warranties and repair obligations in the California-style jurisdictions. The only case in these three states on the subject simply affirms that the Massachusetts express remedy limitation ban applies only if facilities are not maintained in the state. In contrast, the court emphasized, the ban against remedy limitations for breach of implied warranties is absolute.⁵²

47. The placement of the cross-reference in § 2-316 is one of the subjects that the Article 2 study group recommended be given more consideration because of the difficulties it has caused.

48. See *infra* notes 49-51 and accompanying text.

49. MD. CODE ANN., COM. LAW I § 2-316.1(3) (1992).

50. D.C. CODE ANN. § 28:2-316.1(4) (1991).

51. MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992).

52. *Stark v. Patalano Ford Sales, Inc.*, 30 Mass. App. Ct. 194, 202 n.5, 567 N.E.2d 1237, 1242 n.5, *appeal denied*, 409 Mass. 1105, 571 N.E.2d 28 (1991).

C. To Whom the Disclaimer and Remedy Limitations Bans Apply

The statutes are not uniform regarding the parties against whom the bans operate. Clearly some of the states sought to encompass both manufacturers and sellers, recognizing that it was the manufacturer's warranty usually at issue. There was also recognition of the privity problems, more severe at that time, of suing the manufacturer directly even on warranties directly issued by it and running directly to the consumer. Indeed, some of the states, perhaps following the lead of NCA Section 3.304,⁵³ dispensed with privity obstacles as part of their package.

In three of the states, the bans apply by express language both to sellers and manufacturers.⁵⁴ The same result is reached in Kansas with its very broad definition of "supplier," which brings in intermediaries as well.⁵⁵ West Virginia copied the NCA provision that applied the bans to any civil "merchant" and was criticized for not defining the word out of concern that it might be construed as not applicable to manufacturers.⁵⁶ In the District of Columbia, Maryland, and Mississippi, the implied warranty and remedy bans apply to "a seller of consumer goods and services."⁵⁷ Maryland has clarified the reach of the ban by a special definition of "seller" which encompasses "the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer."⁵⁸

Since the District of Columbia and Mississippi have not extended the Article 2 definition of "seller," their disclaimer and remedy bans appear not to affect manufacturers. This result also seems to follow for two

53. NATIONAL CONSUMER ACT § 3.304 (1970) provides:

Notwithstanding any provision of law, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of PRIVACY between the consumer and the defendant. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

Id.

54. ME. REV. STAT. ANN. tit. 11, § 2-316(5) (West Supp. 1992); MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1992).

55. "'Supplier' means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." KAN. STAT. ANN. § 50-624(i) (Supp. 1991).

56. See Cardí, *supra* note 20, at 498; Gerard R. Stowers, Note, *Products Liability-West Virginia Consumer Credit and Protection Act-Definitional Inadequacies*, 77 W. VA. L. REV. 328, 334 (1975).

57. D.C. CODE ANN. § 28:2-316.1(2) (1991); MD. CODE ANN., COM. LAW I § 2-316.1(2) (1992); MISS. CODE ANN. § 75-2-315.1(1) (Supp. 1988).

58. MD. CODE ANN., COM. LAW I § 2-314(1)(a) (1992). The definition applies only to the implied warranty, disclaimer, and privity provisions. *Id.* §§ 2-314 to 2-318. The same provision also "abolish[es]" any "previous requirement of privity." *Id.* § 2-314(1)(b)

additional reasons: (1) the next subsection applies bans against remedy limitations on express warranties only to manufacturers, using that word; and (2) the provisions that give the seller indemnity from any manufacturer for damages resulting from breach of implied warranties suggest that the implied warranty disclaimer ban applies only to sellers.⁵⁹ However, as a practical matter, that conclusion seems of little moment. Making the manufacturer liable to the seller for breach of implied warranties surely is the functional equivalent of banning implied warranty disclaimers by the manufacturer.⁶⁰

D. How "Consumer" Is Defined

The NCA's definition of "consumer" is much broader than that used in typical consumer legislation. " 'Consumer' means a person other than an organization who seeks or acquires business equipment for use in his business, or real or personal property, services, money or credit for personal, family, household or agricultural purposes."⁶¹ Only Kansas and West Virginia have enacted definitions this broad.⁶²

Other enacting states generally use some variation of a consumer purpose test. Several expressly refer to the UCC Article 9 definition of "consumer goods," which turns on the use or purchase "primarily for personal, family or household purposes."⁶³ Some others are functionally similar. Vermont extends protection to purchases for use in connection with operation of a farm even if it is conducted as a business.⁶⁴ The cases illustrate routine applications of these definitions and are considered in the text covering the individual states.⁶⁵

59. D.C. CODE ANN. § 28:2-316.1 (1991); MISS. CODE ANN. § 75-2-315.1 (Supp. 1988). Maryland has the same provisions. MD. CODE ANN., COM. LAW I § 2-316.1(2), .1(3) (1992). Although the language makes the manufacturer liable to the seller for both the warranty of merchantability and of fitness for a particular purpose, presumably it would be interpreted so that the manufacturer's exposure as to a fitness warranty would be limited to circumstances in which the manufacturer's conduct would give rise to that warranty. Merchantability may be thought of as running with the product. Fitness for a particular purpose requires communication between the buyer and seller.

60. Perhaps this was viewed as a means of making the manufacturer liable without trying to confront the privity barrier, an issue which at that time was considerably more formidable than it is now. See ME. REV. STAT. ANN. tit. 11, § 2-318 (West Supp. 1992); MD. CODE ANN., COM. LAW I § 2-314(1) (1992); MASS. ANN. LAWS ch. 106, § 2-318 (Law. Co-op. Supp. 1992); MISS. CODE ANN. § 11-7-20 (Supp. 1988).

61. NATIONAL CONSUMER ACT § 1.301(8) (1970).

62. KAN. STAT. ANN. § 50-624(b) (Supp. 1991); W. VA. CODE § 46A-6-102(b) (1992).

63. U.C.C. § 9-109(1) (1992).

64. VT. STAT. ANN. tit. 9, § 2451a(a) (Supp. 1992).

65. See *infra* notes 247-567 and accompanying text.

E. Goods Covered

Most of the total ban statutes apply to both new and used goods either because they are phrased in absolute terms without any reference to new or used,⁶⁶ or because, as in Maryland and Mississippi, there is an exception for older motor vehicles,⁶⁷ thereby implying that everything else is covered. The Connecticut and Vermont statutes, however, apply only to new or unused goods.⁶⁸ Three states otherwise in the total ban group permit disclaimer of goods known to be defective if there is full, conspicuous disclosure.⁶⁹ All of these are discussed in more detail below.⁷⁰

Six of the jurisdictions expressly apply the bans to both goods and services.⁷¹ However, this statutory application to services has figured in only a few cases. The most prominent of these is *Corral v. Rollins Protective Services Co.*,⁷² in which the Kansas Supreme Court held that the remedy ban applied to non-UCC warranties, including a contract to install and service a fire and burglar alarm system.⁷³ Thereafter, the statute was amended to restrict application to UCC warranties.⁷⁴

Some of the statutes fall within the special exceptions or rules found in a number of states regarding such widely diverse subjects as blood, tissue, and livestock. This group of statutes is briefly considered below.⁷⁵

66. D.C. CODE ANN. § 28:2-316.1 (1991); KAN. STAT. ANN. § 50-639 (Supp. 1991); MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992); W. VA. CODE § 46A-6-107 (1992).

67. MD. CODE ANN., COM. LAW I § 2-316.1 (1992); MISS. CODE ANN. § 75-2-315.1 (Supp. 1988).

68. CONN. GEN. STAT. ANN. § 42a-2-316(5) (West 1990); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1992).

69. D.C. CODE ANN. § 28:2-316.1 (1991); CONN. GEN. STAT. ANN. § 42a-2-316(5) (West 1990); KAN. STAT. ANN. § 50-639 (Supp. 1991).

70. See *infra* text accompanying notes 91-94.

71. D.C. CODE ANN. § 28:2-316.1 (1991); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (West Supp. 1992); MD. CODE ANN., COM. LAW I § 2-316.1 (1992); MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992); MISS. CODE ANN. § 75-2-315.1 (Supp. 1988); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1992).

72. 240 Kan. 678, 732 P.2d 1260 (1987).

73. *Id.* at 690-94, 732 P.2d at 1269-72; see *infra* text accompanying notes 273-77. In another total ban state, a court found it unnecessary to decide whether the disclaimer ban applied to a burglar alarm protection system, because the transaction did not involve "consumer goods" inasmuch as plaintiff was a corporation engaged in business. *New England Watch Corp. v. Honeywell, Inc.*, 11 Mass. App. Ct. 948, 948, 416 N.E.2d 1010, 1011 (1981). The implications of the extension are not considered in this paper.

74. In *Farrell v. General Motors Corp.*, 249 Kan. 231, 815 P.2d 538 (1991), the court noted that the amendment to KAN. STAT. ANN. § 50-639(a)(1) (Supp. 1991) makes it "clear that the only prohibition on limitation of warranties is of UCC warranties." *Farrell*, 249 Kan. at 240, 815 P.2d at 545.

75. See *infra* text accompanying notes 107-11.

F. Applying the Prohibitions to Oral and Written Language

Seven of the total ban jurisdictions proscribe the use of either oral or written language to limit implied warranties. The main thrust of the provisions seems to be against contract provisions that reduce rights. Hence, the usual object of these statutes is a written form contract. The reference to "oral" language merely indicates that it is not confined to that situation. Thus, the ban should apply both to completely oral contracts and to contracts in which there is a combination of writings and oral conduct.

The lack of reference in two of the total ban states⁷⁶ to oral language does not mean that a different result was intended. These states more closely follow the National Consumer Act model, which says simply that the warrantor shall not limit. The others followed Massachusetts's lead, which in form proscribed the use of certain language.⁷⁷ Oral limitations are equally impermissible in all of the states.

G. Expansion of the Concept of Merchantability

The NCA definition of merchantability takes the concept beyond its UCC Article 2 definition. It provides that merchantability means

in addition to the qualities prescribed in [Section 2-314 of the UCC] that (a) the goods conform in all material respects to applicable State and Federal statutes and regulations establishing standards of quality and safety of goods and (b) in the case of goods with mechanical, electrical or thermal components, the goods are in good working order and will operate properly in normal usage for a reasonable period of time.⁷⁸

The drafter's comment to this section indicates that there is now to be "compliance with statutes designed to set standards for products sold or furnished to consumers. This could include the safety provisions for automobiles under the Federal Act, standards of grading for meat and food stuffs, useful life of products that are dated and the like."⁷⁹ Since at the time these provisions were drafted the common practice was for warrantor of consumer products to disclaim merchantability, the drafters may have thought additional guidance was necessary because of the absence of consumer related case law. However, this definitional approach was followed only in Kansas and West Virginia⁸⁰ and appears not to

76. KAN. STAT. ANN. § 50-639 (Supp. 1991); W. VA. CODE § 46A-6-107 (1992).

77. MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992).

78. NATIONAL CONSUMER ACT § 3.301(2) (1970).

79. *Id.* cmt.

80. KAN. STAT. ANN. § 50-624(e) (Supp. 1991); W. VA. CODE § 46A-6-102(c) (1992).

have had any impact in the sales case law.

H. Sanctions for Non-Compliance with the Bans

Violation of the NCA disclaimer and remedy bans invokes civil penalty provisions giving the consumer ordinary damages plus twenty percent of the total transaction or \$200, whichever is greater, plus attorney fees.⁸¹ Only Kansas directly followed this approach, with a civil penalty of up to \$2000.⁸² In Vermont a clause violating the bans is "unenforceable";⁸³ in West Virginia, it is "void."⁸⁴ Maine and Minnesota classify such violations as unfair and deceptive trade practices,⁸⁵ thus invoking sanctions available under those acts. That result might follow in other jurisdictions as a matter of judicial interpretation of a Little FTC Act.

III. STATUTES WHICH REQUIRE GREATER PARTICULARITY FOR ALL DISCLAIMERS, LIMIT "AS IS" DISCLAIMERS, EXCEPT USED GOODS FROM DISCLAIMER BANS, AND PROVIDE SPECIALLY FOR LIVESTOCK, AND BLOOD AND TISSUE

There are several other kinds of variations from Section 2-316. These include several different approaches to better communication of the risk transfer that occurs when implied warranties are disclaimed, such as narrowing the concept of "as is" and requiring additional specific language—and sometimes a ritualistic formula—to disclaim. In a few jurisdictions, there is also some focus on the process by which disclaimer is achieved. Some statutes also except used goods from additional formal constraints.

A. Requiring Greater Particularity for Disclaimers: South Carolina and Washington

Both South Carolina and Washington have amended UCC Section 2-316 to require more of warrantors who wish to disclaim implied warranties. The language in the South Carolina provision, taken from earlier drafts of the UCC, is not limited to consumer transactions. The language in the Washington provision has a broader common-law background but has been codified only with respect to consumer transactions.

81. NATIONAL CONSUMER ACT §§ 3.303, 5.303, 5.307 (1970).

82. KAN. STAT. ANN. §§ 50-636(a), 50-639(e) (Supp. 1991).

83. VT. STAT. ANN. tit. 9A, § 2-316 (Supp. 1992).

84. W. VA. CODE § 46A-6-107 (1992).

85. ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1992); MINN. STAT. ANN. §§ 325F.69, 325G.20 (West 1981 & Supp. 1993).

The South Carolina provision simply requires that any language of disclaimer be "specific," and if it "creates an ambiguity in the contract as a whole it shall be resolved against the seller."⁸⁶ The requirement of specificity should invalidate an "as is" disclaimer which does not have further description. In addition, the language creates a slightly different tone. It has not, however, played a significant role in the cases, as is discussed in greater detail below.⁸⁷

The Washington amendment requires that a disclaimer of implied warranties in consumer transactions set forth "with particularity the qualities and characteristics which are not being warranted."⁸⁸ It thus bears similarity to the provisions described below that severely limit the operation of "as is" disclaimers.⁸⁹ However, the Washington provision is part of what began as a common-law inquiry which has probed deeply into the process that may legitimately produce disclaimers and requires that they be negotiated explicitly. The process inquiry has greater significance than the particularity requirement and is discussed in detail later.⁹⁰

B. Confining Disclaimer to Restrictively Defined "As Is" Transactions

Three of the total ban jurisdictions have exceptions for what might be regarded as true "as is" goods, that is, goods which are known to be defective and accordingly are marked down in price. Connecticut thus has a small exception for goods "clearly marked 'irregular, factory seconds or damaged.'" ⁹¹ The District of Columbia excepts goods with "particular defects and limitations" if they are "noted conspicuously in writing at the time of sale."⁹² In Kansas, a supplier may limit implied warranties "with respect to a defect or defects only if the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties."⁹³ The Official Comment to the Kansas provision states that "[t]his provision is intended to cover sales of marked down or irregular goods which are sold as is and where the consumer is aware of the defective condition; dis-

86. S.C. CODE ANN. § 36-2-316(2) (Law. Co-op. 1976). The drafting history of UCC § 2-316 is set forth in JOHN O. HONNOLD & CURTIS R. REITZ, SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW 109-10 (1992). There is brief consideration of the meaning of the version adopted in South Carolina in 1 NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 407-08 (1955).

87. See *infra* notes 384-94 accompanying text.

88. WASH. REV. CODE ANN. § 62A.2-316(4) (West Supp. 1993).

89. See *infra* notes 91-94 and accompanying text.

90. See *infra* text accompanying notes 395-406.

91. CONN. GEN. STAT. ANN. § 42a-2-316 (West 1990).

92. D.C. CODE ANN. § 28:2-316.1(3) (1991).

93. KAN. STAT. ANN. § 50-639(c) (Supp. 1991).

claimers in such sales will of course often be reflected in lower prices."⁹⁴

C. Requiring Strong and Comprehensive Language for "As Is" Disclaimers

One feature of California's Song-Beverly Act is a statutory formula that spells out in exquisite detail what is required to accomplish an "as is" disclaimer.⁹⁵ Presumably, the requirements are designed to communicate the true meaning of "as is" to the consumer. Together, they assume an almost ritualistic character. The statute provides:

(a) No sale of goods, governed by the provisions of this chapter, on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

- (1) The goods are being sold on an "as is" or "with all faults" basis.
- (2) The entire risk as to the quality and performance of the goods is with the buyer.
- (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.⁹⁶

This disclaimer ritual formula strongly influenced the provisions of five states which require in almost identical language that there be (a) a conspicuous writing (b) that clearly informs the buyer (c) prior to the sale (d) in simple and concise language of the listed disclosures.⁹⁷ The most significant change made was the omission in Minnesota and Rhode Island of the third disclosure requirement (that buyer assume all costs of servicing), perhaps on the assumption that its contents were sufficiently implied in the disclosure that all risk is on the buyer.⁹⁸ The Song-Beverly

94. *Id.* § 50-639 cmt. 4 (1983)

95. The California statute defines "as is" and "with all faults" to encompass all sales in which there has been a disclaimer of "all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this chapter." CAL. CIV. CODE § 1791.3 (West 1985). The copycat statutes do not include any such definition.

96. *Id.* § 1792.4(a). Subsection (b) requires that a mail order catalog "contain the required writing as to each item so offered." *Id.* § 1792.4(b).

97. See IND. CODE ANN. § 26-1-2-316(3)(e) (Burns 1992) (limited applicability—see *infra* note 98); MINN. STAT. ANN. § 325G.18 (West 1981); N.H. REV. STAT. ANN. § 382-A:2-316(4) (Supp. 1992); OR. REV. STAT. § 72.8050 (1991); R.I. GEN. LAWS § 6A-2-329(2)(b) (1992).

98. Indiana acted likewise in IND. CODE ANN. § 26-1-2-316(3)(e) (Burns 1992). Since the

"prior to the sale" requirement was, of course, a precursor of the more comprehensive Magnuson-Moss pre-sale availability requirements.⁹⁹

Curiously, there has been no meaningful case law interpretation of this explication of the "as is" disclaimer.¹⁰⁰ Certainly, some interesting issues lurk in the language. For example, do the requirements taken together require actual communication? The language does not require merely that the writing be sufficiently conspicuous that it should come to the attention of a reasonable consumer. The requirement is that it "clearly inform" the buyer.¹⁰¹ Perhaps the California requirement—followed only in Oregon¹⁰²—that the writing be physically attached to the goods gives slight support to the objective interpretation. New Hampshire has added the requirement that the writing be signed by the buyer.¹⁰³

D. Exceptions from Limitations for All or Some Categories of Used Goods

Most of the total ban jurisdictions allow no exceptions, other than those discrete provisions regarding livestock and blood and tissue, which appear in almost all jurisdictions. However, the statutes in Connecticut and Vermont apply only to new and "unused" goods.¹⁰⁴ Both Maryland and Mississippi have exceptions for older motor vehicles.¹⁰⁵ As indicated below, several of the statutes in the Song-Beverly-pattern jurisdictions differentiate between new and used goods.¹⁰⁶

E. Special Statutory Dispensations for Livestock, and Blood and Tissue

A number of jurisdictions have created exceptions for specific kinds of goods or transactions. Presumably, all were considered to pose such special problems that they should not be treated the same as other goods, especially with respect to implied warranties. The statutes deal princi-

provision applies only to catalog sales of audio and video products, it is not discussed in the text with statutes which apply across the board.

99. 15 U.S.C. § 2302 (1988); 16 C.F.R. § 702 (1992).

100. In *East Side Prescription Ctr., Inc. v. E.P. Fournier Co.*, 585 A.2d 1176 (R.I. 1991), the court noted that "the fact that a disclaimer is conspicuous and has been examined by the purchaser is not sufficient to constitute a disclaimer." *Id.* at 1180.

101. See, e.g., CAL. CIV. CODE § 1792.4(b) (West 1985).

102. OR. REV. STAT. § 72.8050(1) (1991).

103. N.H. REV. STAT. ANN. § 382-A:2-316(4) (Supp. 1992).

104. CONN. GEN. STAT. ANN. § 42a-2-316(5) (West 1990); VT. STAT. ANN. tit. 9A, § 2-316(5) (Supp. 1992).

105. MD. CODE ANN., COM. LAW I § 2-316.1(4)(a) (1992); MISS. CODE ANN. § 75-2-315.1(3)(a) (Supp. 1988).

106. See *infra* text accompanying notes 140-43.

pally with two widely diverse subjects: livestock, and blood and tissue. The approaches taken in the statutes also differ widely.

With respect to blood and tissue, some provisions characterize them as transactions of services, not sales, and hence not subject to UCC Article 2. Others expressly exempt them from imposition of implied warranties. The provisions also appear in a variety of places, sometimes in variations of UCC Sections 2-314,¹⁰⁷ 2-315,¹⁰⁸ and 2-316,¹⁰⁹ and sometimes entirely apart from the UCC.¹¹⁰

Exceptions for livestock also center on implied warranties. They likewise appear both outside the UCC and as amendments to UCC provisions.¹¹¹

IV. MERCHANTABILITY OBLIGATIONS AND WARRANTY DISCLAIMER LIMITATIONS IN CALIFORNIA AND COPYCAT STATES

In considering the provisions of California's Song-Beverly Act and its imitators regarding statutory bans against warranty limitations and related matters, one must take into account that they were drafted before the federal Magnuson-Moss Act, when the almost universal practice of warrantor was to give a small express warranty and disclaim completely

107. ALA. CODE § 7-2-314 (1975).

108. S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1988).

109. ALASKA STAT. § 45.02.316 (1986); ARK. CODE ANN. § 4-2-316 (Michie 1991); DEL. CODE ANN. tit. 6, § 2-316 (1974); FLA. STAT. ANN. § 672.316 (West 1966 & Supp. 1992); GA. CODE ANN. § 11-2-316 (Michie 1982); MASS. GEN. LAWS ANN. ch. 106, § 2-316 (Law. Co-op 1984); N.D. CENT. CODE § 41-02-33 (1983); TENN. CODE ANN. § 47-2-316 (1992); TEX. BUS. & COM. CODE ANN. § 2.316 (West 1968 & Supp. 1992); WYO. STAT. § 34.1-2-316 (1991).

110. See, e.g., ARIZ. REV. STAT. ANN. § 32-1481 (1992); CAL. HEALTH & SAFETY CODE § 1603.5 (West 1990); CONN. GEN. STAT. ANN. § 19a-280 (West 1986); GA. CODE ANN. § 51-1-28 (Michie 1982); HAW. REV. STAT. § 325-91 (1985); IDAHO CODE § 39-3702 (Supp. 1992); IND. CODE ANN. § 16-8-7-2 (Burns Supp. 1992); MD. CODE ANN., CTS. & JUD. PROC. § 5-373 (Supp. 1992); MO. ANN. STAT. § 431.069 (Vernon 1992); NEV. REV. STAT. § 460.010 (1985); N.H. REV. STAT. ANN. § 507:8-b (1983); N.M. STAT. ANN. § 24-10-5 (Michie Supp. 1990); N.C. GEN. STAT. § 130A-410 (1992); OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); OR. REV. STAT. § 97.300 (1991); 42 PA. CONS. STAT. ANN. § 8333 (1982); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (West Supp. 1992); VA. CODE ANN. § 32.1-297 (Michie 1992); WASH. REV. CODE ANN. § 70.54.120 (West 1992).

111. E.g., ALA. CODE § 2-15-4 (Supp. 1992); CAL. FOOD & AGRIC. CODE §§ 18501-18502 (West 1986); IOWA CODE ANN. § 554A.1 (West Supp. 1992); KAN. STAT. ANN. § 50-639(h) (Supp. 1991); KAN. U.C.C. ANN. § 84-2-316(3)(d) (Vernon 1992); MO. ANN. STAT. § 400.2-316 (Vernon Supp. 1992); OHIO REV. CODE ANN. § 1302.29(c)(4) (Anderson Supp. 1991); OKLA. STAT. ANN. tit. 12A, § 2-316(3)(d) (West Supp. 1993); OR. REV. STAT. § 72.316(f) (1991); TENN. CODE ANN. § 47-2-315 (1992); TEX. BUS. & COM. CODE ANN. § 2.316(f) (West Supp. 1992); UTAH CODE ANN. § 70A-2-316 (1990); WASH. REV. CODE ANN. § 62A.2-316(3)(d) (West Supp. 1993).

all implied warranties. After the enactment of Magnuson-Moss in 1975, express warranties governing consumer products in all jurisdictions no longer could disclaim the implied warranties totally. They could, however, limit the duration of the implied warranties to that of the express warranty subject to disclosure obligations and some substantive limitations.¹¹² Song-Beverly, which appears to be the model for much of Magnuson-Moss, accommodates reasonably well to this change in business practices.¹¹³ As will be seen, however, provisions in imitator states which adopted only bits and pieces of the California Act do not easily fit the newer limitation of warranty duration.

A. Applying Implied Warranties and Disclaimer Limitations to Manufacturers

Perhaps the greatest point of departure of Song-Beverly from the UCC was its recognition of the role of the manufacturer in consumer transactions. This is, of course, strongly emphasized in its then-revolutionary provisions enhancing consumer remedies against manufacturers. It also appears in various sections dealing with manufacturer warranty issues. The Act provides that the warranty of merchantability attaches to retailers and manufacturers¹¹⁴ and that the warranty of fitness for the particular purpose attaches to manufacturers, retailers, and distributors when the usual requirements of buyer's communication and reliance and seller's knowledge have been satisfied.¹¹⁵ Despite a small glitch that occurred in adapting Song-Beverly, the Oregon statute is in accord.¹¹⁶

In the three other Song-Beverly states, there are no sections that

112. No duration limitation is permitted for "full" warranties. However, "limited" warranties are most common. For limited warranties, implied warranty limitations must be "set forth in clear and unmistakable language and prominently displayed on the face of the warranty." Magnuson-Moss Warranty-Federal Trade Commission Improvement Act § 108(b), 15 U.S.C. § 2308(b) (1988). It is also required that the duration of the written warranty be "reasonable," a condition originally set forth in CAL. CIV. CODE § 1791.1(c) (West 1985), and that the implied warranty limitation be "conscionable."

113. In 1982, CAL. CIV. CODE § 1793.1(a)(1) (West 1985) was amended to require that warrantor conform to Magnuson-Moss standards for disclosure and conditions.

114. *Id.* § 1792 (West 1985).

115. *Id.* §§ 1792.1-1792.2.

116. In adapting Song-Beverly to Oregon's needs, the drafters did not relate the obligation of merchantability to retailers, *see* OR. REV. STAT. § 72.8030 (1991), although they applied the implied warranty of fitness to retailers and distributors in addition to manufacturers. *Id.* § 72.8040. However, the general disclaimer provisions do not differentiate between merchantability obligations at any level of distribution, *id.* § 72.8050, and § 72.8070(2) prescribes a one-year duration for merchantability when "no express warranty is made." *Id.* § 72.8070(2). Thus, the implied warranty obligations seem to attach at all levels of distribution. There should, of course, be no question about the retailer's merchantability obligation. At the very least, it is well founded in Article 2. *See* U.C.C. § 2-314 (1989).

address the subject directly. The closest reference point is in their disclaimer provisions. In Minnesota and Rhode Island, it is provided simply that "every consumer sale" shall be subject to warranties of merchantability and, where appropriate, fitness for purpose.¹¹⁷ In New Hampshire, the statute provides that disclaimers of the implied warranties are not effective as against "merchant sellers" unless there is compliance with the formula.¹¹⁸ None of these provisions gives any real guidance regarding the application of merchantability obligations to persons other than retail sellers. However, New Hampshire also has a provision removing privity as an obstacle to suit against a "manufacturer, seller or supplier."¹¹⁹ Since the anti-privity section applies to actions for both express and implied warranty, this may imply that merchantability and hence disclaimer requirements apply up the chain of distribution.

B. The Song-Beverly Ban Against Disclaimers, Limitations, and Modifications When an Express Warranty Is Made

Curiously, the Song-Beverly Act, while not creating two classes of warranties, provided the model for both the full warranty and the limited warranty Magnuson-Moss Act provisions governing limitation of implied warranties. The precursor of the full warranty disclaimer prohibition rules states that "a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."¹²⁰ This not only banned the old total disclaimer practice, it also prohibited limitation or modification of the implied warranties. It thus appears applicable to the post-Magnuson-Moss common business practice of limiting the duration of the implied warranties to that of the express.

Other provisions of the Act, however, diminish the total ban on limitation of duration so that the provisions quoted above, which look like the Magnuson-Moss full warranty disclaimer ban, become more closely akin to the Magnuson-Moss limited warranty duration scheme.¹²¹ This comes about by virtue of provisions that establish the duration of

117. MINN. STAT. ANN. § 325G.18(1) (West 1981); R.I. GEN. LAWS § 6A-2-329(2) (1992).

118. N.H. REV. STAT. ANN. § 382-A:2-316(4) (Supp. 1992).

119. *Id.* § 382-A:2-318.

120. CAL. CIV. CODE § 1793 (West 1985).

121. Compare Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. § 2308(a) (1988) (prohibiting disclaimer or modification of implied warranty for duration of any written warranty or service contract) with 15 U.S.C. § 2308(b) (1988) (permitting a time limit of implied warranties if equal to the time limit of the written warranty and if the written warranty is reasonable, conscionable, clear, and "prominently displayed").

merchantability (and fitness, if present) as "coextensive" with that of the express warranty if "the duration of the express warranty is reasonable," but not less than sixty days nor more than one year after sale.¹²² Those same fixed periods apply also to new goods sold without express warranty unless there has been a disclaimer in compliance with the magic formula discussed above.¹²³

In short, under Song-Beverly, an express warrantor is prohibited from limiting the substance of the implied warranties in any way, but the Act puts both a floor and a ceiling on the duration of those warranties. Although the issue is disputed—and has not been resolved in the courts—those floor and ceiling provisions apply only to the implied warranties as defined in Song-Beverly and not to the usual UCC implied warranties. One early article, for example, construed the Song-Beverly provisions as limiting the UCC Article 2 merchantability warranty, and therefore "a step backward."¹²⁴ In contrast, another commentator, speaking directly to the issue, concludes that:

Song-Beverly defines the duration only of those implied warranties created by the Act and leaves the duration of UCC implied warranties untouched. The result is that the purchaser may have a Song-Beverly implied warranty of merchantability equal in duration to the express warranty as well as a UCC implied warranty of merchantability of uncertain duration on the same product.¹²⁵

C. *Problems in Copycat States Regarding Disclaimer Limitations*

Because the copycat states did not incorporate all of the elements of Song-Beverly, they have created serious interpretive problems which are somewhat different in Minnesota and Rhode Island than in Oregon. The principal source of difficulty in all three states was the failure to adopt the basic Song-Beverly ban against limitation, modification, or disclaimer when there is an express warranty. Minnesota and Rhode Island tried to get by with a subsection that precluded only disclaimer of implied warranties without mention of modification or limitation.¹²⁶ Also, there is reference only to disclaimer in their sections controlling "as is" disclaim-

122. CAL. CIV. CODE § 1791.1(c) (West 1985). The periods are reduced to 30 days and three months for used goods covered by express warranty. *Id.* § 1795.5(c) (West 1985).

123. See *supra* text accompanying note 97.

124. Clark & Davis, *supra* note 45, at 591.

125. Henry Weinstock, Comment, *Consumer Warranty Law in California under the Uniform Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts*, 26 UCLA L. REV. 583, 638-39 (1979).

126. MINN. STAT. § 325G.19(1) (West 1981); R.I. GEN. LAWS § 6A-2-329(3)(a) (1991).

ers. Their magic formula provisions were borrowed from California but were altered in two important respects.

First, the disclaimer ban language applies not to the makers but to the content of express warranties. Thus, they provide that "[n]o express warranty . . . shall disclaim implied warranties of merchantability, or, where applicable, of fitness."¹²⁷ One consequence, as noted above, is that it is not clear whether the obligation attaches only to retail sellers or to others in the chain of distribution. The second difference is the absence of any reference to modification or limitation. The only ban is on "disclaimer." Given the pre-Magnuson-Moss business practice context, that is not surprising. But how do the bans apply to the later developed contract clauses which limit the duration of implied warranties to that of express warranties? Does the ban against disclaimer apply to the lesser acts of modifying and limiting?

Neither of the statutes defines "disclaimer," and the Article 2 provision¹²⁸ which governs the subject does not use the word. In the context of the California statute, "disclaimer" clearly means total exclusion; the lesser acts of limitation and modification are identified separately.¹²⁹ If the word were construed similarly in the copycat states, a warrantor would be free to limit or modify warranties. The currently ubiquitous warranty that limits the duration of the implied warranties to that of the express could pass muster.

Oregon's truncation of the California Act has produced considerable confusion on this subject. In addition to sharing the deficiencies of Minnesota and Rhode Island discussed above, the Oregon Act provides that effective disclaimer of merchantability by a manufacturer, distributor, or retailer "making an express warranty" requires compliance with the special "as is" disclosure provisions.¹³⁰ But if an express warranty is made, there cannot be, by definition, an "as is" sale.¹³¹ Just what to do with this erroneous byproduct of the Oregon pruning process is unclear. Perhaps it should be construed, like the Minnesota and Rhode Island provisions, as precluding total disclaimer by express warrantor of implied warranties without affecting attempts to limit or modify them.

The only copycat state that says anything about the duration of the implied warranties is Oregon. It provides that in sales of new goods, if

127. MINN. STAT. § 325G.19(1) (West 1981); R.I. GEN. LAWS § 329(3)(a) (1991).

128. U.C.C. § 2-316 (1989).

129. CAL. CIV. CODE § 1793 (West 1985).

130. OR. REV. STAT. § 72.8070(1) (1991).

131. Although there is no definition of "as is" in the Oregon Act, the California characterization should be applied even though the Oregon drafters in their streamlining attempt did not copy the California definition.

no express warranty is made or the duration of an express warranty is not stated, the implied warranty of merchantability "endures" for one year for ordinary goods or, for motor vehicles, for the lesser of one year or 12,000 miles.¹³² The duration of implied warranties is coextensive with express warranties subject to a floor of sixty days and a ceiling of one year.¹³³

D. The Difficulty of Applying the Disclaimer Ban and "As Is" Sale Requirements to "As Is" Sales by Dealers of Products Covered by a Manufacturer's Warranty

At least two problems exist with the application of these statutes to "as is" sales by a dealer of products covered by a manufacturer's warranty. The first, whether the "as is" magic formula applies to such transactions, is shared by all of the states. Prima facie, the special requirements should apply. After all, they were imposed presumably because of dissatisfaction with the less onerous UCC Article 2 provisions.¹³⁴ But they simply do not work! The conspicuous writing requirement is not a problem, although one wonders whether a consumer would expect the disclaimer to be physically "attached" to a new automobile or mobile home. None of the three required disclosures fit the situation, however. A dealer-disclaimer-but-manufacturer-warranty sale (a) is not an "as is" sale; (b) does not place the entire risk with the buyer; and (c) does not require the buyer to assume the entire cost of servicing or repair.

If the provisions cannot apply, does it follow that a dealer may not sell on an "as is" basis when the product is covered by a manufacturer's warranty? That is a possible reading of the Song-Beverly ban against "a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given," limiting, modifying, or disclaiming implied warranties.¹³⁵

Since the dealer under Song-Beverly would have a statutory right to indemnity from the manufacturer for losses attributable to breach of the implied warranty,¹³⁶ that would not be an unreasonable result.¹³⁷ How-

132. OR. REV. STAT. § 72.8070(2) (1991).

133. *Id.* § 72.8070(3).

134. U.C.C. § 2-316 (1989).

135. CAL. CIV. CODE § 1793 (West 1985). One case in a total ban jurisdiction did hold that a dealer's attempt to confine consumers to warranty claims against distant component suppliers fell within the disclaimer ban. *Stair v. Gaylord*, 232 Kan. 765, 776, 659 P.2d 178, 187 (1983).

136. CAL. CIV. CODE § 1792 (West 1985).

137. There is, however, a technical problem regarding the duration of the implied warranty

ever, the language of the provision does not answer the question clearly. The "transacting" language suggests that the ban applies to the party who is conducting the immediate transaction. Under that view, the dealer could disclaim because it had not given an express warranty. But the language referring to the giving of the express warranties is not keyed to a particular actor. The reference is to "a sale in which express warranties are given."¹³⁸ Certainly, a consumer who gets a product covered by a manufacturer's express warranty has been involved in a sale in which express warranties have been given. That line of reasoning would lead to the conclusion that the dealer could not disclaim the implied warranties totally.

The closest any of the cases have come to discussing the issue is the footnote observation in a manufacturer-warranty-dealer-disclaimer case that "[p]laintiff did not question the effectiveness of the disclaimer by the dealer and we make no judgment as to its effectiveness."¹³⁹

E. New or Used Goods?

The complexity of the California statute somewhat obscures its reach. The implied warranties mandated by the Act apply in sales of new goods whether or not covered by express warranty.¹⁴⁰ If an express warranty is given, the implied warranties also attach to used goods.¹⁴¹ This pattern is followed in Minnesota and Rhode Island.¹⁴² Oregon's requirements apply only to new goods, whether or not covered by express warranty.¹⁴³ Since New Hampshire does not include any analogous controlling definitions, its limitations presumably apply to both new and used goods, regardless of the existence of an express warranty.

of merchantability. If the dealer cannot disclaim and does not give an express warranty, it is subject to a merchantability duration of one year. The manufacturer, on the other hand, may limit duration to a shorter period. *Id.* § 1791.1(c); *see supra* text accompanying note 123.

138. CAL. CIV. CODE § 1793 (West 1985).

139. *Clark v. Ford Motor Co.*, 46 Or. App. 521, 527 n.5, 612 P.2d 316, 319 n.5 (1980).

140. The warranty sections, *e.g.*, CAL. CIV. CODE § 1792 (West 1985), relate the warranties to sales of consumer goods. The limitation to "new" goods comes from the definition in *id.* § 1791(a) (West Supp. 1983).

141. *Id.* § 1795.5 (West 1985).

142. MINN. STAT. § 325G.17(2) (West 1981); R.I. GEN. LAWS § 6A-2-329(1)(a) (1991).

143. OR. REV. STAT. § 72.8010(1) (1991).

V. STATUTES WHICH IMPOSE OBLIGATIONS ON EXPRESS
WARRANTOR REGARDING SERVICE AND REPAIRS AND
PROVIDE NEW REMEDIAL OPTIONS FOR BREACH
OF THESE DUTIES

A. *The Song-Beverly Act*

As already indicated, the California Song-Beverly Act has important provisions that affirm the implied warranty obligations of everyone in the chain of distribution and regulate disclaimers.¹⁴⁴ It has a much more ambitious scheme, however. The total ban jurisdictions sought to improve the position of the consumer by a shotgun blast of prohibiting implied warranty disclaimers and, in some states, banning remedy limitations. California took a rifle shot approach aimed at several discrete targets.

The specific problems targeted by Song-Beverly presumably included the difficulty of dealing with and obtaining repairs from distant warrantors, long delays in getting response, run-arounds from persons in the distributive chain, and the inadequacy of ordinary sales law remedies—including the unavailability of attorney fees. The Act thus focused on defining the express warrantor's obligation to remedy defects, enlisting the aid of those in the chain of distribution, providing new remedies more specific than those available under the UCC, and enhancing them with attorney fees and, in egregious cases, multiple damages.

The obligations created by the Act routinely are addressed to manufacturers. However, the Act provides expressly that if express warranties are made by anyone other than the manufacturer, obligations "shall be the same as that imposed on the manufacturer under this chapter."¹⁴⁵

1. Elevating the Express Warrantor's Promise of Repair or
Replacement to a Statutory Duty

In many respects, the starting point of Song-Beverly is the express warrantor's usual undertaking to repair or replace if there are defects. The Act elevates that promise to a statutory obligation. As one early incisive commentator put it, "the Act actually approves and adopts with modifications the exclusive repair or replace limitation of remedy clause prevalent in consumer warranties."¹⁴⁶ In contrast to those total ban jurisdictions which apparently preclude the use of that standard clause,¹⁴⁷

144. See *supra* text accompanying notes 114-15, 120-23.

145. CAL. CIV. CODE § 1795 (West 1985).

146. Weinstock, *supra* note 125, at 647.

147. See *supra* text accompanying notes 24-29.

Song-Beverly builds on it by specifying how the warrantor will comply with it and sharpening the consumer's remedies when the warrantor is unable or unwilling to do so. The statute, moreover, acknowledges the reality of the modern chain of distribution and "establishes a chain of responsibility for warranty service in which the express warrantor is always the final link."¹⁴⁸

As a technical matter, these obligations apply only where there is an "express warranty" that is defined in Song-Beverly more narrowly than in either UCC Article 2 or the Magnuson-Moss Act. The central point of reference is that it be a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance."¹⁴⁹ In addition, the use of the words "warrant" or "guarantee" in a written statement creates a warranty within the Act,¹⁵⁰ as does an oral or written affirmation of conformity to any sample or model.¹⁵¹

This definition is broader than the UCC definition of express warranty¹⁵² inasmuch as it makes no express or implied reference to reliance or basis of the bargain, but it is narrower than the UCC definition in several important respects. As is also true of the Magnuson-Moss definition, it does not apply to oral warranties, nor does it apply to written statements of description, promise, or affirmation unless they include an undertaking by the warrantor to preserve or maintain the "utility or performance" of the goods or compensate if the undertaking fails.¹⁵³ There is even doubt whether the definition would reach a promise that the goods would perform in the future if it were not accompanied by an undertaking to maintain that performance or compensate,¹⁵⁴ although such a promise would satisfy the Magnuson-Moss definition.¹⁵⁵ Despite those shortcomings, the definition clearly reaches the ubiquitous repair or replace undertaking, and the Act clamps firmly on it.

148. Weinstock, *supra* note 125, at 631.

149. CAL. CIV. CODE § 1791.2(a)(1) (West 1985).

150. *Id.* § 1791.2(b).

151. *Id.* § 1791.2(a)(2).

152. U.C.C. § 2-313 (1989).

153. This is illustrated in *Keith v. Buchanan*, 173 Cal. App. 3d 13, 220 Cal. Rptr. 392 (1985), where the court held that although statements of seaworthiness of a sailboat in literature may constitute an express warranty under Article 2, they do not satisfy the Song-Beverly definition of express warranty. *Id.* at 19-22, 220 Cal. Rptr. at 395-97.

154. See Weinstock, *supra* note 125, at 628-29.

155. 15 U.S.C. § 2301(6) (1988).

2. Ensuring That Goods Covered by Express Warranty Will Be Repaired in Timely Fashion

Every manufacturer who makes an express warranty covering goods sold in the state must maintain "sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold"¹⁵⁶ or contract with and adequately compensate independent service and repair facilities to discharge those obligations.¹⁵⁷ Additionally, service and repair must be commenced within a reasonable time and ordinarily must be completed within thirty days¹⁵⁸ after delivery of the nonconforming goods by the buyer to the service facility. If the goods are bulky or installed, the buyer's delivery obligation is discharged by giving written notice.¹⁵⁹ New and enhanced remedies are available if the warrantor does not live up to these obligations.

If the manufacturer does not maintain or contract for service and repair facilities within the state, or does not provide its authorized service and repair facilities with literature and replacement parts sufficient to effect repair during the warranty period, the statute authorizes the consumer to obtain repairs and even replacement or refund by a retailer at the expense of the manufacturer.¹⁶⁰ The buyer is given several options. The first is to return the goods to the selling retailer who *shall* (a) service or repair, or (b) direct the buyer to a close independent facility willing to accept service or repair without charge to the buyer but with a statutory claim against the manufacturer, or (c) replace the goods, or (d) refund the purchase price.¹⁶¹

Alternatively, the buyer may return the goods to any retail seller of such goods who *may* (but appears not to be obligated to) give the same options to the buyer. If the buyer does not get relief by pursuing either of the retailer options, she may obtain repairs from an independent facility and the manufacturer will be liable for the cost of repairs. Under this unusual provision, the buyer is not to be liable to the repair facility; the facility may hold only the manufacturer liable.¹⁶² Both retailers and in-

156. CAL. CIV. CODE § 1793.2(a)(1)(A) (West Supp. 1993). Although these duties expressly apply to "manufacturers," it is clear that they also apply to anyone who makes express warranties under the Act. *Id.* § 1795 (West 1985).

157. *Id.* § 1793.2(a)(1)(B) (West Supp. 1993).

158. *Id.* § 1793.2(b).

159. *Id.* § 1793.2(c).

160. *Id.* § 1793.3.

161. *Id.* § 1793.3(a). The refund obligation is to take into account any use value before discovery of the nonconformity. *Id.*

162. *Id.* § 1793.3(c). This provision applies only when the goods have a wholesale price to the retailer of \$50 or more. *Id.*

dependent service facilities expressly are entitled to indemnity from the manufacturer.¹⁶³

3. The Statutory Remedy of Repair, Replacement, or Reimbursement

The modern motor vehicle lemon-aid laws that provide the remedies of repair, replacement, or reimbursement are, in many respects, the end result of evolution from Song-Beverly via the federal Magnuson-Moss Act. The significance of that approach can best be appreciated against the background of the UCC remedial pattern that applies when a warrantor has failed to meet its express warranty promise to repair or replace defective goods.

The UCC permits a warrantor to limit the buyer's remedies for breach of warranty to repair or replacement, so long as the limitation is "expressly agreed to be exclusive,"¹⁶⁴ and "circumstances" do not cause the limited remedy to "fail of its essential purpose."¹⁶⁵ If the limited remedy of repair and replacement has failed its essential purpose, the buyer may turn to the Article 2 remedy provisions.

Where the product has serious defects, the buyer ordinarily wants a return of the purchase price. In UCC parlance, the buyer wants to revoke acceptance. This step is available upon the buyer's showing that the defects "substantially impair[]" the value of the contract to the buyer,¹⁶⁶ and there has not been "any substantial change in condition of the goods which is not caused by their own defects."¹⁶⁷ In other cases, the buyer may have damages.¹⁶⁸

Thus, the consumer under Article 2 must satisfy the statutorily undefined requirements of two separate legal tests: failure of essential purpose of the contractually limited remedy of repair and replacement, and revocation of acceptance. Song-Beverly collapsed the two into a single test. The original articulation of the new test was that the buyer would be entitled to replacement or reimbursement if the manufacturer was unable to return the goods in merchantable condition within thirty days. In addition to easing the buyer's burden, the provision also made the remedies available directly against the manufacturer, thus leapfrogging traditional privity barriers.¹⁶⁹

163. *Id.* §§ 1793.5-1793.6 (West 1985).

164. U.C.C. § 2-719(1) (1989).

165. *Id.* § 2-719(2).

166. *Id.* § 2-608(1).

167. *Id.* § 2-608(2).

168. *Id.* § 2-714.

169. *Id.* § 2-318.

These innovations turned up in the federal Magnuson-Moss Act several years later in more sophisticated form—but applicable only to “full” warranties:

[I]f the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be).¹⁷⁰

The provision clearly bears the marks of Song-Beverly, but the insertion of the “reasonable number of attempts” condition in effect reinstated the Article 2 test for failure of essential purpose in more specific language and in the context of the familiar repair and replacement clause. That requirement in turn found its way back to California so that Song-Beverly today contains the following test:

[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.¹⁷¹

The final step in this evolution has been to refine further in the motor vehicle lemon laws the test for “reasonable number of attempts” by establishing presumptions which *prima facie* satisfy the requirement.¹⁷² Song-Beverly’s adoption of a remedy more appropriate for consumers than that provided by Article 2 has been widely followed in statutes governing motor vehicle sales and, to a lesser extent, sales of manufactured homes. As indicated further below, it has not been emulated on a general basis, having been followed in only one other state.

4. Enhancing UCC Article 2 Remedies

Song-Beverly enhances the UCC Article 2 remedy provisions in several important respects. First, the measure of damages must include the Song-Beverly rights of replacement or reimbursement in addition to the usual damages available under Article 2.¹⁷³ Secondly, a successful buyer is entitled to costs and attorney fees.¹⁷⁴ Finally, if the buyer establishes

170. 15 U.S.C. § 2304(a)(4) (1988).

171. CAL. CIV. CODE § 1793.2(d)(1) (West Supp. 1993).

172. See *infra* text accompanying notes 179-81.

173. CAL. CIV. CODE § 1794(b) (West Supp. 1993).

174. *Id.* § 1794(d).

that the warrantor's failure to comply with its warranty or Song-Beverly obligations was willful, the judgment may also include a civil penalty up to twice any actual damages, except in a class action or when the claim was based solely on breach of implied warranty.¹⁷⁵ The obligation of the manufacturer to retailers and independent servicemen is emphasized by the availability of treble damages and attorney fees in actions brought by them for "willful or repeated violation of the provisions of this chapter" by the manufacturer.¹⁷⁶

The warranty duration for both express and implied warranties is tolled for the period of repair activity under the Act. Moreover, the warranty period does not expire at all if the repairs were not made or if they did not remedy the nonconformity, and the buyer so notified the manufacturer or seller within sixty days after completion of the repairs.¹⁷⁷ The manufacturer's liability to retailer sellers also is extended during such a tolling period.¹⁷⁸

5. Special Motor Vehicle Provisions

California's motor vehicle lemon law provisions fit within the Song-Beverly structure but with some special rules. As in other lemon laws, there is a statutory presumption that a reasonable number of attempts has been made to conform the vehicle to the express warranty if the same nonconformity has been subject to repair four or more times by the manufacturer or its agents or the vehicle was out of service for more than thirty calendar days.¹⁷⁹ If the manufacturer does not replace a lemon or refund the buyer's money, it is subject to a civil penalty of up to two times the amount of damages in addition to usual damages and reasonable attorney fees.¹⁸⁰ In contrast to the general Song-Beverly civil penalty provisions, the motor vehicle sanctions do not require a showing that the violation was willful.¹⁸¹

175. *Id.* § 1794(c). Before 1983, the ceiling was treble damages. *Id.* § 1794(a) (West 1973).

176. *Id.* § 1794.1 (West 1985).

177. *Id.* § 1795.6 (West Supp. 1993). These provisions apply only to goods selling for \$50 or more. *Id.*

178. *Id.* § 1795.7 (West 1985).

179. *Id.* § 1793.22(b) (West Supp. 1993).

180. *Id.* § 1794(e)(1).

181. The civil penalty is not available if (1) the manufacturer maintains a qualified third-party dispute resolution process, *id.* § 1794(e)(2); or (2) the buyer has not given the manufacturer written notice requesting replacement or refund, *id.* § 1794(e)(3); or (3) the manufacturer has responded to such a written notice within 30 days. *Id.* § 1794(e)(4). A civil penalty under these motor vehicle provisions may not be tacked onto a civil penalty under the more general Song-Beverly penalty provisions. *Id.* § 1794(e)(5).

6. Application to Used Goods

Song-Beverly applies to used goods only if an express warranty is given.¹⁸² In that circumstance, the obligations of the retailer or distributor who makes the express warranty are the same as those imposed on manufacturers regarding new goods, except that the duration of implied warranties is to be coextensive with that of the express warranty (provided the duration of the express warranty is reasonable), but not less than thirty days nor more than three months.¹⁸³ It is clear that it is the warranting retailer or distributor who is to maintain service facilities and that the manufacturer has no liability to the retailer or distributor in connection with such an express warranty.¹⁸⁴

7. Other Special Provisions

The Act contains extensive special provisions for new and used assistive devices¹⁸⁵ and a few twists for clothing, consumables, draperies,¹⁸⁶ and electronic or appliance products.¹⁸⁷ It requires also that written warranties be set forth in simple and readily understood language, comply with the Magnuson-Moss disclosure requirements,¹⁸⁸ and be accompanied by a statement of the location of the warrantor's repair facilities.¹⁸⁹ Work orders and invoices for repairs must contain certain information, including a disclosure of basic legal rights and remedies.¹⁹⁰

B. Adaptation of Song-Beverly Express Warrantor Service Obligations and New Consumer Remedy Provisions in Other States

Of the states considered above that were influenced by the Song-Beverly approach toward disclaimer of implied warranties, only Oregon, Minnesota, and Rhode Island reflect any direct influence of the Act's express warranty obligations.

182. *Id.* § 1795.5 (West 1985). This section specifically provides these special rules "[n]otwithstanding the provisions of subdivision (a) of Section 1791 defining consumer goods to mean 'new' goods." *Id.* § 1795.5.

183. *Id.* § 1795.5(c). These provisions apply only to those implied warranties that arise under Song-Beverly. See *supra* text accompanying note 125. Moreover, the Act does not place those time limits on implied warranties that have not been limited or modified pursuant to U.C.C. § 2-316.

184. CAL. CIV. CODE § 1795.5(a) (West 1985).

185. *Id.* §§ 1791(p), 1792.2(b), 1793.02 (West 1985 & Supp. 1993).

186. *Id.* § 1793.35 (West 1985).

187. *Id.* §§ 1791(r)-(s), 1793.03 (West Supp. 1993).

188. *Id.* § 1793.1(a) (West 1985). This presumably makes state remedies available for violation of the federal disclosure standards.

189. *Id.* § 1793.1(b).

190. *Id.* § 1793.1(a)(2).

The Oregon statute follows more of the California provisions than any other state, but it nevertheless only minimally mimics the Song-Beverly approach to enforcing repair obligations of express warrantors and does not attempt to enhance remedies other than by giving the buyer the statutory right to repair, replacement, or refund (less use value).¹⁹¹ Each manufacturer who gives an express warranty must have "in this state sufficient service and repair facility to carry out the terms of such a warranty," and service or repair is to be "commenced as soon as possible."¹⁹² The buyer is to deliver the goods for service unless they are bulky or installed, and if the manufacturer is "unable" to repair, it must replace or reimburse (less reasonable use value).¹⁹³ If the manufacturer does not have service and repair facilities within the state, the retail seller is to honor the manufacturer's express warranty. The retailer has the option of replacement, servicing, or repair. If that is not done "in accordance with the terms and conditions of the warranty," the retail seller is to reimburse the consumer (less reasonable use value).¹⁹⁴ The retailer is then entitled to indemnity from the manufacturer plus reasonable handling charges and, in the case of service and repair, "a reasonable profit."¹⁹⁵

The Oregon statute does not contain any detail on some matters covered at length in Song-Beverly, such as what constitutes a sufficient service or repair facility,¹⁹⁶ nor does it authorize warrantors to designate independent repair or service facilities to perform their obligations.¹⁹⁷ More importantly, it leaves remedies to implication other than the cursory statement that they are "cumulative" and are not to be construed so as to restrict any remedies available under UCC Article 2.¹⁹⁸

The Minnesota statute, after barring express warrantors from disclaiming implied warranties, simply commands that express warrantors "honor the terms" of their express warranty¹⁹⁹ and that a manufacturer who authorizes a retail seller to perform warranty service must pay the

191. OR. REV. STAT. § 72.8100, 72.8110 (1991).

192. *Id.* § 72.8100.

193. *Id.*

194. *Id.* § 72.8110.

195. *Id.* § 72.8130.

196. See CAL. CIV. CODE § 1793.2 (West Supp. 1993) (specifying that facilities be reasonably close to areas where the goods are sold).

197. See *id.* § 1793.2(a).

198. OR. REV. STAT. § 72.8190 (1991).

199. MINN. STAT. ANN. § 325G.19(2) (1981). The statute provides expressly that "the manufacturer shall honor an express warranty made by the manufacturer; the distributor shall honor an express warranty made by the distributor; and the retail seller shall honor an express warranty made by the retail seller." *Id.*

retailer for it.²⁰⁰ The statute is silent as to the nature of any remedy available under these provisions, but it does say that a violation shall be treated as a violation of the state's Consumer Fraud Act, thus triggering claims for costs and attorney fees.²⁰¹

The Rhode Island statute is a unique patch-work quilt using only a few Song-Beverly patterns, namely that express warrantors should have service facilities and honor their warranties.²⁰² The section contains slightly different requirements for "makers" of express warranties and "manufacturers" who give express warranties. All "makers" (including manufacturers) must honor their own express warranties and designate a representative in the United States to provide services or repairs.²⁰³ If, however, there are "competent repair or service facilities" available in Rhode Island, the maker must provide for service to be done within the State.²⁰⁴

Each manufacturer who makes an express warranty must designate a representative in Rhode Island to provide service and make parts available to that representative within thirty days of an order.²⁰⁵ The manufacturer also is required to make adequate service information and replacement parts available to both designated service facilities and to independent service facilities for four years after the last sale of any given model or type.²⁰⁶

Although the section falls short of requiring that the manufacturer's designated representative perform services, it does address the standard for any services that are performed. The representative is to perform services "in a manner fully consistent with that service or repair which would be made if the consumer were not entitled to warranty protection."²⁰⁷ Such service is to be completed within thirty days if the part is in stock. If not, the representative must order the part within two days and complete service within ten days after receiving the part.²⁰⁸ The

200. *Id.*

201. Section 325G.20 provides that violation of these provisions is to be treated as a violation of § 325F.69, the Consumer Fraud Act. *Id.* § 325G.20. Section 8.31(3a) provides for costs and attorney fees in cases involving violations of § 325F.69. *Id.* § 8.31(3a) (West Supp. 1993).

202. R.I. GEN. LAWS § 6A-2-329 (1992).

203. *Id.* § 6A-2-329(3)(b).

204. *Id.* § 6A-2-329(4). The statute goes on to provide that "this shall not be construed to exclude use of facilities outside the state of Rhode Island where acceptable to all parties." *Id.* Just how this is to operate in the consumer context is unclear.

205. *Id.* § 6A-2-329(3)(c).

206. *Id.* § 6A-2-329(3)(c), (3)(e), (5).

207. *Id.* § 6A-2-329(3)(f).

208. *Id.*

manufacturer must pay the representative for both parts and labor at the same rate charged by the representative for like services to retail consumers.²⁰⁹

The statute does not appear to provide any private remedy for violation of these duties. The sole sanction identified is liability for a "fine of twenty-five dollars (\$25.00) a day for every day of non-compliance and/or be liable to the consumer for replacement of the item to be repaired."²¹⁰ Although the reference to liability to the consumer suggests a private action remedy, the title of the subsection in which it appears is "penalties," and the last sentence provides that "prosecution" under the provision "shall be brought by the attorney general's department."²¹¹

C. *The Progression of Remedies and Sanctions into the Motor Vehicle Lemon Laws and the Manufactured (Mobile) Home Statutes*

The explosion of motor vehicle lemon laws since 1982 has brought to the fore the Song-Beverly emphasis on (1) enforcement of express warranties, (2) the streamlined lemon-aid remedy of refund or replacement when there has not been timely repair, (3) provision for the direct liability of the manufacturer, (4) the availability of attorney fees for successful consumers, and (5) in some states, sanctions for non-compliance. Manufactured home statutes in a lesser number of states and used car statutes in a few states have gone one step beyond, mandating certain terms of an express warranty that must be part of the sale. Occasionally the mandatory approach is used for a specific kind of product. Thus, in New York, a full warranty is required in a sale of solar thermal systems.²¹²

1. New Motor Vehicles

The typical motor vehicle lemon law²¹³ is, in some respects, a codification of basic Song-Beverly principles from which there have been excised all references to implied warranties and service facilities and to which has been added an important refinement of the refund remedy.

209. *Id.* § 6A-2-329(3)(d).

210. *Id.* § 6A-2-329(6).

211. *Id.*

212. N.Y. ENERGY LAW § 7830.5 (McKinney 1984).

213. Lemon laws have been adopted in some form in 46 states and the District of Columbia. They are discussed and catalogued in NATIONAL CONSUMER LAW CTR., SALES OF GOODS AND SERVICES ch. 34 & app. I (2d ed. 1989), and in PRIDGEN, *supra* note 14, at ch. 15 & app. 15A & 15B. For a slightly dated but still comprehensive discussion, see Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589 *passim*.

The approach is simple and direct. No manufacturer is required to give an express warranty, but if one is given, the warrantor assumes a statutory duty to live up to it.²¹⁴ If repair does not bring the vehicle into conformity with the warranty after a reasonable number of attempts, the consumer is entitled to replacement or refund.

The real innovation in these laws is the use of a statutory formula to establish a presumption as to when a reasonable number of attempts has been made to conform the vehicle to the express warranty and thus trigger the replacement or refund remedy. Typically the presumption applies if repair has not been achieved after four unsuccessful attempts to cure the same nonconformity or if the vehicle has been out of service for more than thirty calendar days.²¹⁵ In some states, "nonconformity" is described in terms of either "defect" or "condition,"²¹⁶ which presumably eases the burden of the consumer to establish exactly what is wrong with the complex machinery. In some states, failure to replace or refund may subject the manufacturer to multiple damages or a civil penalty of up to two times the amount of damages and reasonable attorney fees.²¹⁷

Warrantors are often authorized to require the consumer to submit disputes to an informal dispute settlement mechanism before bringing suit under the lemon law if very specific notice about the procedure is given at the time of the sale, and the mechanism is qualified pursuant to the statute.²¹⁸ In some states, dissatisfaction with contract-mandated arbitration has prompted the formation of state agencies to perform the function.²¹⁹

Perhaps the outstanding feature of these statutes is their more finely honed remedy provisions. As previously noted, the UCC Article 2 remedial scheme for refunds necessitates resort to two rather generic legal standards, the failure of the essential purpose doctrine in Section 2-719

214. Usually, the statutory duties are applicable only during a stated period, such as 12 months or 12,000 miles, even if the duration of the express warranty is longer. *See, e.g.*, IDAHO CODE § 48-905 (1988); KY. REV. STAT. ANN. § 367.842 (Baldwin 1986); PA. STAT. ANN. tit. 73, § 1960 (1984).

215. NATIONAL CONSUMER LAW CTR., *supra* note 213, § 34.7.3; PRIDGEN, *supra* note 14, § 15.05.

216. *See, e.g.*, N.C. GEN. STAT. § 20-351.3 (1992) (providing that "if the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing or correcting, or arranging for the repair or correction of, any defect or condition or series of defects or conditions").

217. *E.g.*, CAL. CIV. CODE § 1794(e)(1) (1988).

218. Often the standard used to determine whether the mechanism is "qualified" is that promulgated in 17 C.F.R. § 703 by the Federal Trade Commission for use under the federal Magnuson-Moss Act. *See* PRIDGEN, *supra* note 14, § 15.06.

219. For a discussion of the "Lemon Law II" movement in this direction, see *id.* § 15.06[3].

and revocation of acceptance in Section 2-608.²²⁰ The lemon law rules have taken disputes down from the clouds of an Article 2 generic inquiry to the specificity of four times or thirty days. And, although the laws often include some requirement akin to the substantial impairment ingredient of the revocation of acceptance standard of Article 2, they still provide a more bright-line approach. Indeed, the lemon laws appear to be utilized even in those total ban jurisdictions which go so far as to prohibit a limitation of remedies for express warranties.²²¹ It seems very likely that they have absorbed some of the litigation that would otherwise have been brought under the other kinds of statutes considered in this Article.

2. New Mobile Homes

Legislation in approximately eighteen states and federal legislation relating to loans for certain mobile home²²² purchases goes one step beyond either Song-Beverly or the lemon laws. The statutes *require* an express warranty.

The state statutes generally require that there be a warranty—usually for one year—against defects in materials and workmanship. Sometimes this is stated in terms of a warranty against “substantial” defects, and sometimes the remedy is keyed to the existence of substantial defects.²²³ The statutes may apply the standard to specified key portions of the unit. In some states, a differently stated warranty applies to each participant in the distribution process, from manufacturer, supplier, dealer, and set-up agent.²²⁴

The statutes differ on such issues as application of the warranties to subsequent purchasers and remedies. Because the consumer has received a written warranty, standard sales theory is available. Attorney fees and, occasionally, punitive damages, may also be available. In some states, the mobile home provisions are integrated with the motor vehicle lemon laws or a larger consumer protection act like Song-Beverly.²²⁵ In still others, there is a tie-in with state unfair and deceptive trade practices

220. See *supra* text accompanying notes 164-69.

221. See, e.g., *Adams v. Nissan Motor Corp.*, 182 W. Va. 234, 387 S.E.2d 288 (1989).

222. The term “manufactured home” usually appears in the legislation.

223. See, e.g., ARK. CODE ANN. § 20-25-110 (Michie 1977); CAL. CIV. CODE § 1797.3 (1980); IDAHO CODE § 39-4010 (1988); MICH. COMP. LAWS ANN. § 125.994 (West 1974).

224. For extensive discussion of the issues and laws relating to mobile homes, see BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMM’N, MOBILE HOME SALES AND SERVICE: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE (Aug. 1980); see also NATIONAL CONSUMER LAW CTR., *supra* note 213, § 35.6 (discussing state and federal warranties and safety requirements); PRIDGEN, *supra* note 14, at ch. 17 (addressing warranties, time limits, sites of repair, and remedies).

225. See, e.g., KAN. STAT. ANN. § 8-2401 (Supp. 1990).

statutes.²²⁶

Federal involvement occurs at two levels. The more pervasive is the National Manufactured Housing Construction and Safety Standards Act of 1974,²²⁷ which establishes construction and safety standards for new mobile homes. Although there is no private cause of action for consumers for violation of the Act, there is federal enforcement of the standards, and violation may be regarded as a breach of the implied warranty of merchantability. In addition, the standards are incorporated into state statutes and are involved in the second level of federal involvement:

The second federal presence is the requirement of a one-year manufacturer warranty as a condition to obtaining a loan insured under 12 U.S.C. § 1703.²²⁸ This warranty obligates the manufacturer to correct any nonconformity with federal construction and safety standards as well as "any defects in materials and workmanship which become evident within one year after the date of delivery."²²⁹ Again, there is no federal cause of action available for consumers, but since the obligation is set forth in a written warranty, ordinary sales or contract law is applicable even if specific state mobile home statutes are not.

3. Used Motor Vehicles

The mandatory warranty approach also has been adopted in a handful of states with respect to used cars. The duration of the required warranty varies according to the mileage on the vehicle. For example, in New York the term is ninety days or 4000 miles for cars with less than 36,000 miles at the time of sale, and sixty days or 3000 miles if the car has more than 36,000 but less than 80,000 miles.²³⁰ In some states, cars costing less than \$1500 are exempted.²³¹ Statutory remedies are similar to those found in lemon laws.²³²

226. See, e.g., MASS. GEN. LAWS ANN. ch. 140, §§ 32L, 32M (1973).

227. 42 U.S.C. § 5401 (1988).

228. 24 C.F.R. § 201.21(d)(1) (1992).

229. *Id.* § 201.21(d)(2).

230. N.Y. GEN. BUS. LAW § 198-b (McKinney 1984). Rhode Island has similar provisions. See R.I. GEN. LAWS § 31-5.4-2 (1982) (providing minimum 60 day, 3000 mile warranty if 36,000 miles or less, and minimum 30 day, 1000 mile warranty if between 36,000 and 100,000 miles).

231. See, e.g., CONN. GEN. STAT. § 42-221 (1987).

232. See generally NATIONAL CONSUMER LAW CTR., *supra* note 213, § 34.12 (discussing history and scope of lemon laws); PRIDGEN, *supra* note 14, § 16.03 (considering options of states desiring more used car rules).

VI. THE CORROSIVE IMPACT OF THE MAGNUSON-MOSS ACT ON
THE EFFECTIVENESS OF NON-UCC LIMITATIONS ON
DISCLAIMERS AND REMEDY LIMITATIONS

Ironically, the Magnuson-Moss Act, which was designed to expand consumer rights, has, as a practical matter, undermined the total ban statutes. This federal Act prohibits the total disclaimer of implied warranties when an express warranty is given.²³³ However, it then permits the "conscionable" limitation of the duration of the implied warranties to that of an express warranty of reasonable duration if conspicuously disclosed.²³⁴ Finally, the Act expressly preempts state laws that permit broader limitations, without affecting those that give the consumer greater protection.²³⁵

The provisions posed practical problems for warrantors. They not only had to abandon their long-standing practice of total disclaimer of implied warranties for consumer products, but they also had to learn how to draft provisions that could apply both in jurisdictions which permitted limitations on the duration of implied warranties and in those which, like those under consideration here, did not. The Federal Trade Commission (FTC) provided a way out which, it must be said in candor, seems suspect under traditional standards of unfair and deceptive practices.

The FTC originally proposed safeguarding the rights of consumers from total ban jurisdictions by requiring that warrantors list by name those jurisdictions in which modifications were unenforceable.²³⁶ However, after objection from national warrantors about the burden of monitoring state law changes,²³⁷ the FTC withdrew and provided that warrantors could comply with the Magnuson-Moss Act disclosure requirements even if they set forth limitations unenforceable under state law so long as they were followed by a boilerplate caveat which advised that the limitation might not apply.²³⁸ Indeed, all consumers can now expect to find this FTC sanctioned, laconic statement in a written warranty: "Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you."²³⁹

233. 15 U.S.C. § 2308(a) (1988).

234. *Id.* § 2308(b).

235. *Id.* § 2308(c).

236. Proposed Rules, Trade Regulation Rule; Sales of Used Motor Vehicles, 50 Fed. Reg. 21,269-01 (1985).

237. See CLARK & SMITH, *supra* note 19, ¶ 17.02[3][c], at 17-10-11.

238. Rules & Regulations, Trade Regulation Rules; Sales of Used Motor Vehicles, 52 Fed. Reg. 18,522-02 (1987).

239. 16 C.F.R. § 701.3(a)(7) (1992).

The result of this curious compromise is that consumers in total ban jurisdictions have no way of knowing from standard written warranties that their implied warranty rights may extend beyond the stated duration of a written warranty.²⁴⁰ In this circumstance, the consumer may also have the mistaken impression that all of his rights expire with the end of the express warranty.²⁴¹ Even the total ban jurisdictions do not require that warrantors disclose the unlimited character of implied warranties. That, however, does not seem nearly as deceptive as a disclosure that implied warranty rights are limited in duration when that is simply untrue!

The Magnuson-Moss Act disclosure rules interfere equally with the consumer's knowledge of remedy rights in jurisdictions that limit the ways in which warrantors may restrict consumer rights. Again, the FTC retreated, permitting warrantors to impose a remedy limitation even in total ban states so long as it is followed by the incantation: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."²⁴² Curiously, the same statement must also be made in states that permit such limitations. All warranties are required to carry the dramatic closing statement: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."²⁴³

An issue analogous to these Magnuson-Moss problems arose in Kansas, a total ban state. There, suppliers routinely used form contracts which contained prohibited disclaimer terms. They sought to achieve compliance with the disclaimer ban while continuing to use the form contracts by stamping on the front of the form a "NOTICE TO CERTAIN KANSAS LESSEES," which stated that these provisions did not apply in Kansas. The federal district court held the language sufficient to "eradicate" the unlawful disclaimers and resurrect the implied warranties.²⁴⁴ This holding seems especially suspect in a state with such strong legislation.²⁴⁵ Surely a supplier who has gone to the trouble of preparing a stamp to use on the forms could also prepare something to paste over the prohibited terms.

Although many applaud the Magnuson-Moss rules because they ob-

240. The duration of an implied warranty, of course, depends on the nature of the product, whether it is new or used, the price, and the usual factors that have a bearing on the concept.

241. This is, of course, also true in all jurisdictions where the warrantor does not purport to limit the implied warranties at all.

242. 16 C.F.R. § 701.3(a)(8) (1992).

243. *Id.* § 701.3(a)(9).

244. *Agristor Leasing v. Meuli*, 634 F. Supp. 1208, 1212, 1219 (D. Kan. 1986).

245. See *infra* text accompanying notes 254-87.

viate the need for manufacturers to prepare a "multiplicity" of written forms,²⁴⁶ it is remarkable how these disclosure rules may operate to mislead consumers in substantial ways. This state of affairs surely suggests that the appellate cases in these states cannot possibly provide an accurate compass of the reach of these laws when warrantors remain free to misrepresent or at least obscure them.

VI. THE CASE LAW

A. *The Total Ban Jurisdictions*

1. Connecticut

The Connecticut statute is identical to Vermont's except for a statutory exception for "goods clearly marked as 'irregular,' 'factory seconds' or 'damaged.'"²⁴⁷ No cases have turned on the statutory provisions.

2. District of Columbia

In 1982, a new UCC Section 2-316.1 was enacted for the District of Columbia. It appears to have been modeled largely on Maryland's statute, except for the very limited exception available for "particular defects" that are "noted conspicuously in writing at the time of sale."²⁴⁸

In *Patton v. Chrysler Motors*,²⁴⁹ the court held that the statute's anti-disclaimer provisions invalidated those typical provisions of the standard automobile warranty that limit the duration of implied warranties to that of the express warranties in the manner prescribed by the Magnuson-Moss Act.²⁵⁰ Such a limitation, the court stated, cannot stand in the face of the total prohibition against disclaimers of merchantability in the D.C. statute.²⁵¹ Hence, a claim of breach of merchantability was asserted successfully even though the period of the express warranty had expired.

This decision also is notable because the court applied the D.C. law even though the consumer purchased the new automobile from a dealership located in Virginia. The dealer knew that the consumer would keep

246. Barkley Clark, *Lemon Aid for Kansas Consumers*, 46 J. KAN. BAR ASS'N 143, 147-48 (1977). The author, who wrote before the *Meuli* decision, stated: "As things now stand, the interests of national manufacturers and Kansas consumers are nicely reconciled: the manufacturers can market their products in Kansas without changing the form to comply with the Consumer Protection Act, while Kansas consumers are fully protected by that Act." *Id.* He did cite one district court decision which awarded a civil penalty where the manufacturer's form contained disclaimer language without the FTC proviso. *Id.* at 147 n.31.

247. CONN. GEN. STAT. ANN. § 42a-2-316(5) (1990).

248. D.C. CODE ANN. § 28:2-316.1(3) (1991).

249. 14 U.C.C. Rep. Serv. 2d (Callaghan) 1041 (D.C. Super. 1990).

250. *Id.* at 1047-48.

251. *Id.* at 1047.

the car in D.C. and arranged for registration of the vehicle there.²⁵² The court held that the strong public policy underlying the D.C. legislation was paramount and should be enforced rather than the Virginia law, which permitted such a limitation of duration.²⁵³

3. Kansas

The Kansas provisions are part of a broad consumer protection act and are quite comprehensive.²⁵⁴ Moreover, the definitions are unusually broad, so that "consumer" is defined to include use for business and agricultural purposes, and a "supplier" need not deal directly with the consumer.²⁵⁵ Disclaimer of the implied warranties is prohibited (with a narrow exception discussed below), as is any limitation of remedies for breach of those implied warranties, and violation of either prohibition triggers civil penalty and attorney fee provisions and is by statute denominated an "unconscionable act or practice."²⁵⁶ The old privity defense is eliminated.

The basic application of the anti-disclaimer provisions and their reach to distant suppliers is illustrated in *Stair v. Gaylord*.²⁵⁷ Buyer had purchased an irrigation system through a local dealer of General Irrigation, which was in the business of buying components, assembling them, and selling the completed irrigation systems.²⁵⁸ Both General Irrigation and a component supplier separately gave an express warranty that the product would be "free from defects in material and workmanship," and further provided that the express warranty was in lieu of all other warranties both express and implied.²⁵⁹ Both were held to have violated the act by attempting to limit obligations to the express warranty.²⁶⁰ General Irrigation also ran into trouble with a clause that provided: "Components manufactured by others than General Irrigation Company have no warranty except that given by the original manufacturer."²⁶¹ This attempt to confine consumers to warranty claims against distant component suppliers also fell within the disclaimer ban.²⁶²

252. *Id.* at 1042-43.

253. *Id.* at 1047.

254. KAN. STAT. ANN. § 50-639(a) (Supp. 1991).

255. *Id.* §§ 50-624(b), 50-624(i).

256. *Id.* § 50-627(b)(7).

257. 232 Kan. 765, 659 P.2d 178 (1983).

258. *Id.* at 768, 659 P.2d at 181.

259. *Id.* at 769-70, 659 P.2d at 183.

260. *Id.* at 770, 659 P.2d at 183-84.

261. *Id.* at 771, 659 P.2d at 184.

262. The court, however, did note that the "applicability" of the rule as regards distant suppliers like General Irrigation "will be questionable in subsequent breach of warranty cases"

The ban against remedy limitations, however, applies only to the breach of the implied warranties. Thus, *Gaylord* was later distinguished in a case in which the consumer's claim was founded on a General Motors Protection Plan service contract.²⁶³ The consumer had argued that the limitation of consequential damages in that agreement violated the statutory prohibition.²⁶⁴ The court held that, unlike the clause in *Gaylord*, the service contract did not affect the implied warranties. Rather, it provided "something in addition" to them.²⁶⁵ Thus, it is permissible to limit consequential damages "in an agreement that provides extra benefits in addition to the implied warranties."²⁶⁶ The court noted also that breach of warranty itself does not violate the anti-disclaimer provisions.²⁶⁷

A Kansas Attorney General opinion has confirmed the Consumer Protection Act's broad definition of "supplier" by saying the Act applies to sales of used cars by brokers who sell on consignment. Consequently, implied warranties may not be disclaimed in such sales.²⁶⁸

The disclaimer ban clearly applies to used as well as new goods. Thus, a used car dealer may not limit a consumer to a "30 day or 1000 mile Warranty 100% on Drive Line & Air Conditioner."²⁶⁹ Accordingly, the dealer may be liable when the motor totally fails fifty days after the sale.²⁷⁰ The court emphasized, however, that a used car is not held to the same standards as a new one:

[T]he implied warranty of merchantability varies with the particular car. A late model, low mileage car, sold at a premium

in light of the 1981 Products Liability Act, KAN. STAT. ANN. §§ 60-3301 to -3320 (Supp. 1983), which now excuses a seller from liability for a defective product manufactured elsewhere if he had no knowledge of the defect and could not have discovered the defect while exercising reasonable care. See *Gaylord*, 232 Kan. at 771, 659 P.2d at 184.

263. *Farrell v. General Motors Corp.*, 249 Kan. 231, 815 P.2d 538 (1991).

264. *Id.* at 236, 815 P.2d at 543.

265. *Id.* at 241, 815 P.2d at 546.

266. *Id.* It is slightly noteworthy that this was a case in which the court scarcely could restrain its impatience with plaintiffs for refusing to accept an early offer of General Motors to fix the van. The court was not impressed with plaintiffs' insistence that (1) payment should be made pursuant to the General Motors Protection Plan and not by General Motors, and (2) they wanted to know exactly what caused the fire. *Id.* at 237-38, 815 P.2d at 544. In the court's view, this was a case that had gotten out of hand, and the court reversed a number of rulings that had resulted in a verdict for more than \$100,000 in actual and punitive damages and civil penalties in a case in which there were no personal injuries. *Id.* at 238-47, 815 P.2d at 544-50.

267. *Id.* at 241, 815 P.2d at 546.

268. Monopolies and Unfair Trade—Consumer Protection—Disclaimer or Limitation of Warranties, 86 Op. Kan. Att'y Gen. No. 25 (Feb. 20, 1986).

269. *Dale v. King Lincoln-Mercury, Inc.*, 234 Kan. 840, 840, 676 P.2d 744, 746 (1984).

270. *Id.* at 844, 676 P.2d at 748.

price, is expected to be in far better condition and to last longer than an old, high mileage, "rough" car that is sold for little above its scrap value. However, as noted above, there is no contention in this case that the implied warranty of merchantability had "expired."²⁷¹

The same point had been made shortly after adoption of the statutory disclaimer ban by a commentator who observed that "the concept of warranty is a relative one: a used car is not unmerchantable simply because it wears out faster than a new one."²⁷²

The disclaimer ban also was held to apply to warranties that might arise in non-sales transactions.²⁷³ The court held that a contract to install and service a fire and burglary alarm system may give rise to an implied warranty even though it was not a sale and hence was not governed by either UCC Article 2 or the Magnuson-Moss Act.²⁷⁴ Thus, in this case the statutory ban on the limitation of remedies for breach of the implied warranty of merchantability applied so as to invalidate contract provisions which purported to limit plaintiff's recovery to \$250.²⁷⁵ In a more recent decision,²⁷⁶ however, the Kansas court indicated that the exact holding in the prior case has been undermined by an amendment to the statute: "Since then, KSA 50-639(a)(1) has been amended to make it expressly clear that the only prohibition on limitation of warranties is of UCC warranties."²⁷⁷ Nonetheless, the earlier case is still a reminder that remedy limitations are within the purview of the Kansas Act.

The statutory exception to the general ban against implied warranty disclaimers has not been satisfied in any of the decided cases. It permits a supplier to limit the implied warranties only upon a showing that "the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties."²⁷⁸ An early commentator suggested the exception should be available only where the consumer is purchasing "irregular" or "marked down" goods on an "as is" basis where the defect

271. *Id.*

272. Sen. Robert F. Bennett, *The 1973 Legislative Session—A Legislative Review*, 42 J. KAN. BAR ASS'N 153, 192 (1973).

273. *Corral v. Rollins Protective Servs. Co.*, 240 Kan. 678, 694, 732 P.2d 1260, 1271-72 (1987).

274. The court described such a warranty as follows: "[A] person who contracts to perform work or to render service, without an express warranty, impliedly warrants to perform the task in a workmanlike manner and to exercise reasonable care in doing the work." *Id.* at 688-89, 732 P.2d at 1268.

275. *Id.* at 690, 732 P.2d at 1271.

276. *Farrell v. General Motors Corp.*, 249 Kan. 231, 815 P.2d 538 (1991).

277. *Id.* at 240, 815 P.2d at 545.

278. KAN. STAT. ANN. § 50-639(c) (Supp. 1991).

is reflected in the cost of the product.²⁷⁹ A more recent opinion of the Kansas Attorney General noted that the exception is "intended for sales where the defects are the basis for discounting the price of the item. It is not intended to be a license for 'as is' sales in all circumstances. In our opinion, brokers may not sell vehicles 'as is' as a general practice."²⁸⁰

Some suppliers in Kansas apparently have continued to use standard forms in which implied warranties are disclaimed, without violating the Kansas Act. As illustrated in two leasing cases decided in Kansas federal district court, the suppliers stamped the following provision on the front of the lease:

NOTICE TO CERTAIN KANSAS LESSEES—Notwithstanding the terms hereof to the extent prohibited by Kansas law, no exclusion, modification, or limitation herein of any implied warranty of merchantability or fitness for a particular purpose otherwise applicable to this transaction or any remedy provided lessee by law, including the measure of damages, shall apply to a lease made within the State of Kansas where lessee is a natural person or sole proprietorship.²⁸¹

The court held that this language was effective to "eradicate any unlawful disclaimers" and resurrect the implied warranties.²⁸² Thus, there could be no violation of the obligation not to disclaim implied warranties. The district court concluded, however, that finance lessors are not "merchants," and therefore an implied warranty under UCC Section 2-314 could not arise.²⁸³ The latter analysis falls far short of that employed by the Kansas Supreme Court to determine whether a warranty arises in a non-sales transaction,²⁸⁴ but arguably is consistent with the provision that specifies that the disclaimer ban relates to implied warranties as defined in UCC Sections 2-314 and 2-315.²⁸⁵ Presumably, the difficulties involved in the lease cases will be resolved by Kansas's enactment of UCC Article 2A,²⁸⁶ which deals expressly with problems of warranties in finance leases.²⁸⁷

279. Bennett, *supra* note 272, at 192.

280. Monopolies and Unfair Trade—Consumer Protection—Disclaimer or Limitation of Warranties, 86 Op. Kan. Att'y Gen. No. 25 (Feb. 20, 1986).

281. Wight v. Agristor Leasing, 652 F. Supp. 1000, 1005 (D. Kan. 1987); Agristor Leasing v. Meuli, 634 F. Supp. 1208, 1212 (D. Kan. 1986).

282. Meuli, 634 F. Supp. at 1219.

283. *Id.* at 1220.

284. See Corral v. Rollins Protective Servs. Co., 240 Kan. 678, 684-94, 732 P.2d 1260, 1265-72 (1987). It does, however, rest in part on the Kansas Court of Appeals decision in CIT Financial Servs., Inc. v. Gott, 5 Kan. App. 2d 224, 228, 615 P.2d 774, 777-78 (1980).

285. U.C.C. §§ 2-314, 2-315 (1989).

286. 1991 Kan. Sess. Laws ch. 363 (effective Feb. 1, 1992).

287. William H. Lawrence & John H. Minan, *Resolved: That the Kansas and Other State*

4. Maine

In 1973, the legislature amended Section 2-316 of the Maine UCC to add subsection five, which in substance was identical to that of Vermont except for a specific tie-in of a violation of Sections 2-314, 2-315, or 2-316 to the state's Unfair Trade Practices Act.²⁸⁸ In 1975, it was amended to apply to used as well as new goods.

The legislative history of the provision shows its strong public policy foundations:

Maine consumers are customarily required to waive or limit any and all warranty rights granted to them under the provisions of the Uniform Commercial Code. In the purchase of automobiles, mobile homes, appliances and a great many necessities, the Maine consumer is forced to release his warranty rights under the U.C.C. and accept in their place warranties which are oftentimes meaningless and unconscionable.

While the waiver or limitation of such warranty rights is certainly a valid and reasonable commercial concept in a contract bargaining session between two enterprises, it has been grossly abused by the business community in its dealings with Maine consumers who are forced to accept contract terms which are dictated solely by the seller.²⁸⁹

Most of the few appellate cases involving the provisions are inconsequential. Not surprisingly, decisions have held the section not applicable to the purchase of expensive electronic equipment for a motel²⁹⁰ or to heavy industrial equipment.²⁹¹ The Maine court also has emphasized that its analysis of disclaimers and express warranties in commercial cases "does not apply to transactions in consumer goods, for which the Legislature has made special provision."²⁹²

The most far-reaching decision involves an interpretation of the provisions that make violation of Sections 2-314, 2-315, and 2-316 per se violations of the state's unfair trade practices act. In *State ex rel Tierney*

Legislatures Should Enact Article 2A of the Uniform Commercial Code, 39 KAN. L. REV. 95, 108 (1990).

288. ME. REV. STAT. ANN. tit. 11, § 2-316(5)(a) (West Supp. 1992) (providing that "[a] violation of sections 2-314, 2-315 or 2-316, arising from the retail sale of consumer goods and services, shall constitute a violation of Title 5, chapter 10, Unfair Trade Practices Act").

289. *State ex rel Tierney v. Ford Motor Co.*, 436 A.2d 866, 872 (Me. 1981) (quoting the Statement of Fact accompanying the legislative document to subsection (5), L.D. 1042, 1973 Me. Laws 444).

290. *Todd Equip. Leasing Co. v. Milligan*, 395 A.2d 818, 820 n.3 (Me. 1978).

291. *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 320 n.5 (Me. 1982).

292. *Id.*

v. Ford Motor Co.,²⁹³ the court held that although the open-ended language of the provision made possible several interpretations,²⁹⁴ the most reasonable one was that a per se violation of the UDTPA occurs only when there has been "an attempt to obtain a waiver or limitation at the time of a sale" of the implied warranties in violation of Maine's Section 2-316(5).²⁹⁵

The decision was based in part on the fact that the UDTPA subsection was subsidiary to Section 2-316(5) and on concern about far-reaching consequences, including the fact that among the grounds for suspending or revoking an automobile dealer's license was violation of the UDTPA.²⁹⁶ The result also comported with "the right of commercial enterprises . . . to contest whether a breach of warranty has, in fact, occurred."²⁹⁷ The decision as it related to breach of warranty as an unfair or deceptive trade practice was followed in a memorandum decision in *Porter v. Sangillo*.²⁹⁸

5. Maryland

Maryland is a total ban jurisdiction as to disclaimer and limitation of remedies for implied warranties.²⁹⁹ Unlike the Massachusetts statute, however, the Maryland ban does not on its face apply to manufacturers, but "seller" has been redefined in Maryland for purposes of UCC Sections 2-314 through 2-318 to include the manufacturer.³⁰⁰ Hence, the ban has been held to apply to a manufacturer.³⁰¹

In *Maryland Independent Automobile Dealers v. Motor Vehicle Administration*,³⁰² the court held that the statutory ban applies to "as is" provisions and to a "50-50" warranty under which the buyer was to pay half of the cost of any repairs during the statutory period.³⁰³ The court

293. 436 A.2d 866 (Me. 1981).

294. Among the court's citation of possibilities was breach of warranty, failure of a warrantor to honor warranties or remedy obligations, or an attempt to obtain a disclaimer in violation of ME. REV. STAT. ANN. tit. 11, § 2-316(5)(a) (West Supp. 1992). *Tierney*, 436 A.2d at 869.

295. *Tierney*, 436 A.2d at 874.

296. *Id.* at 874.

297. *Id.*

298. 437 A.2d 855 (Me. 1981).

299. MD. CODE ANN., COM. LAW I § 2-316.1 (1991).

300. *Id.* § 2-314(1)(a).

301. *Sheehan v. Anthony Pools*, 50 Md. App. 614, 619, 440 A.2d 1085, 1088 (1982), *aff'd*, 295 Md. 285, 455 A.2d 434 (1983).

302. 41 Md. App. 7, 394 A.2d 820 (1978).

303. *Id.* at 12, 394 A.2d at 823. The automobile dealers' association brought suit, contesting a regulation promulgated by the Maryland Motor Vehicle Administration that provided that "[a] warranty may not contain language which specifically disclaims any implied warranty of merchantability or fitness" and gave as examples a provision that disclaimed those

held also that used cars are clearly subject to Section 2-316.1. Three years later, the Maryland legislature limited Section 2-316.1 by adding subsection (4), which carved out an exception for certain older used car sales.³⁰⁴

In *Anthony Pools v. Sheehan*,³⁰⁵ the court held that the public policy underlying Section 2-316.1 required an expansive interpretation of consumer goods.³⁰⁶ Plaintiff was injured when he fell from the side of the diving board of his new, in-ground, backyard swimming pool.³⁰⁷ His breach of merchantability claim was countered by a sales contract provision that provided conspicuously that its express warranties were in lieu of any other warranties express or implied.³⁰⁸

Noting that the swimming pool package was a mixed goods-services transaction, the court said that application of the predominant purpose test would require the conclusion that the diving board was merely incidental to what was predominantly a services transaction, and that consequently an Article 2 warranty would not apply.³⁰⁹ Such a result would be contrary, however, to the "legislative understanding" underlying Maryland's Section 2-316.1 that UCC warranties apply to goods in consumer transactions. Therefore, the "all or nothing" classification approach of the predominant purpose test should not be used.³¹⁰ More appropriate is the "gravamen" test, under which one should look to see whether the cause of the problem was the goods or the services.³¹¹ Here, the cause was the goods. Therefore, Section 2-316.1 should apply, and the merchantability claim cannot be barred by the contract disclaimer.³¹²

6. Massachusetts

In 1970, Massachusetts was the first state to enact a total ban.³¹³

warranties in specific language, an "as is" provision, and a "50-50" warranty. *Id.* at 9, 394 A.2d at 822. Violation of the provision was one of the grounds available for suspension and revocation of dealer licenses. *Id.* The court upheld the regulation and based its decision in part on MD. CODE ANN., COM. LAW I § 15-312 (1991), which prohibited dealers from willfully failing to comply with the terms of a warranty or guarantee. *Maryland Indep. Auto. Dealers*, 41 Md. App. at 12, 394 A.2d at 823.

304. MD. CODE ANN., COM. LAW I § 2-316.1(4) (Supp. 1991).

305. 295 Md. 285, 455 A.2d 434 (1983) (*Sheehan II*).

306. *Id.* at 297-98, 455 A.2d at 440-41.

307. *Id.* at 286-87, 455 A.2d at 435.

308. *Id.* at 287, 455 A.2d at 436.

309. *Id.* at 297-98, 455 A.2d at 441.

310. *Id.* at 298, 455 A.2d at 441.

311. *Id.* (quoting the test from 1 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES 121, § 2-102:04 (1982)).

312. *Id.* at 298, 455 A.2d at 441.

313. See MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1992).

These provisions, rooted in the National Consumer Act, have by themselves not been the subject of much case law.³¹⁴ Perhaps more important has been the role the provisions, as later amended, have played in conjunction with a series of amendments to the Massachusetts Uniform Commercial Code in the evolution of products liability law in the commonwealth.

These provisions, including the bans on disclaimers and remedies, the elimination of privity requirements, the restriction of the defense of failure to give notice to prejudice situations, the extension of warranties to non-sales transactions, and special products liability statutes of limitations, were used together to develop products liability law "to provide a remedy as comprehensive as that provided by § 402A of the Restatement [of Torts]."³¹⁵ Accordingly, in *Back v. Wickes Corp.*³¹⁶ the court concluded it need not adopt strict liability in tort but that the strict liability cases of other jurisdictions would be "a useful supplement to our own warranty case law."³¹⁷

In *New England Watch Corp. v. Honeywell, Inc.*,³¹⁸ the court said that even if an agreement for burglar alarm protection came within UCC Article 2 (an issue expressly not decided in the case), it did not involve "consumer goods" in this case because plaintiff corporation was engaged in business.³¹⁹ Hence, the anti-disclaimer provisions of Section 2-316A were not applicable, and the conspicuous disclaimer of implied warranties was effective.³²⁰

In *Stark v. Patalano Ford Sales, Inc.*,³²¹ the court held that a warrantor's attempt to bar loss of use damages for breach of *express* warranty could not prevent the recovery of loss of use damages for breach of *implied* warranties.³²² Moreover, the court, citing prior authority, approved a trial court instruction that breach of warranty constituted an

314. See *infra* notes 320-29 and accompanying text.

315. *Swartz v. General Motors Corp.*, 375 Mass. 628, 629, 378 N.E.2d 61, 63 (1978).

316. 375 Mass. 633, 378 N.E.2d 964 (1978).

317. *Id.* at 640, 378 N.E.2d at 968.

318. 11 Mass. App. Ct. 948, 416 N.E.2d 1010 (1981).

319. *Id.* at 948, 416 N.E.2d at 1011.

320. *Id.* For another analysis, see *supra* text accompanying notes 273-77 (discussing *Coral v. Rollins Protective Servs. Co.*, 240 Kan. 678, 732 P.2d 1260 (1987)).

321. 30 Mass. App. Ct. 194, 567 N.E.2d 1237, *rev. denied*, 409 Mass. 1105, 571 N.E.2d 28 (1991).

322. *Id.* at 203, 567 N.E.2d at 1242 (holding that the ban on limitation of remedies for breach of implied warranties is absolute; the ban on limitation of remedies for breach of express warranties applies unless manufacturer maintains facilities within the commonwealth to provide reasonable and expeditious performance).

unfair and deceptive practice under Massachusetts law.³²³

In 1975 Clark and Davis raised, in the context of discussion of the then recently enacted Massachusetts statute, the issue of "whether continued use of written disclaimers invalidated by the statute constitutes a deceptive trade practice insofar as consumers might not realize that such disclaimers were legally unenforceable."³²⁴ The issue is certainly not unique to any state and remains largely unresolved. One Massachusetts decision, *Hannon v. Original Gunite Aquatech Pools, Inc.*,³²⁵ comes close to deciding the issue but is a little too muddled to decipher completely. The contract in question was for the purchase and installation of an in-ground swimming pool in plaintiff's back yard. The dispute was a typical dispute with a contractor over the cost of extras for excavation, delays, defects, and stoppage because of disputes.³²⁶ The contract contained a clause requiring the buyer to submit any dispute to arbitration before any lawsuit.³²⁷

The buyer sued, alleging violations of the Massachusetts Unfair and Deceptive Trade Practices Act. The contractor demanded arbitration. Although the court originally stayed the buyer's action pending arbitration, and the arbitrator's award for the contractor was confirmed, the lawsuit was later tried.³²⁸ The trial court entered findings and conclusions that (a) the arbitrator's confirmed award required decision for the contractor, and (b) the contractor did not commit any unfair or deceptive practices.³²⁹

The court upheld the lower court's conclusion that there was no misrepresentation or breach of implied warranty³³⁰ and therefore no claim for violation of the unfair and deceptive trade practices act on

323. *Id.* at 203, 567 N.E.2d at 1243. The court relied on *Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. 228, 235-36, 467 N.E.2d 443, 447 (1984). The court's most recent comprehensive consideration of breach of warranty as an UDAP violation is *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193-94, 552 N.E.2d 95, 99 (1990). See *Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988, 992-99 (1st. Cir. 1992) (holding that customers of a utility may not recover under state deceptive practices statute purely economic damages related to breach of warranty in contract between utility and manufacturer) and the helpful discussion in the district court opinion, 756 F. Supp. 620, 622-31 (D. Mass. 1990).

324. Barkley Clark & Michael J. Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 KAN. L. REV. 567, 587 (1975).

325. 385 Mass. 813, 434 N.E.2d 611 (1982).

326. *Id.* at 819, 434 N.E.2d at 615.

327. *Id.* at 815, 434 N.E.2d at 614.

328. *Id.* at 815, 434 N.E.2d at 613.

329. *Id.* The court also made specific factual findings to avoid retrial in the event it was wrong with respect to finding (a). *Id.*

330. *Id.* at 823-24, 434 N.E.2d at 617. The court held there was no breach of merchantability because the defects did not affect the "operative essentials" of the pool and could easily be repaired within one-half day—which the seller had offered to do long ago. *Id.*

those claims. It had more difficulty with the claim that the inclusion of the arbitration clause itself violated the Act. Relevant to that issue was the Attorney General's regulation promulgated pursuant to the Act, which provided: "It shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty. The utilization of a deceptive warranty is unlawful."³³¹

The court construed provisions of the Unfair and Deceptive Practices Act (UDAP) to preclude a stay of claims asserted pursuant to that act, and thus concluded that the trial court's decision to stay the original lawsuit was erroneous with respect to the buyer's UDAP claims.³³² Arbitration was appropriate, however, for those contract claims not governed by the Act.³³³ That left the buyer's claim that use of the clause itself was an unfair or deceptive practice because it constituted a modification of a consumer's remedies for breach of warranties, in violation of the statute and the Attorney General's regulation.

The court was not responsive. Even assuming that the pool is encompassed within the phrase "consumer goods, services or both" as used in Chapter 106, Section 2-316A of the Massachusetts General Laws Annotated, and that the arbitration clause "exceeds, limits, or modifies a consumer's remedies for breach of express or implied warranties, Section 2-316A merely declares *unenforceable* language which attempts to exclude, limit, or modify such remedies."³³⁴ Neither Section 2-316(A) nor the Attorney General's regulation declares such a term to be illegal. Therefore, the mere use of the clause was not a UDAP violation.³³⁵

The court appears to have been affected strongly by the facts of the case: the clause itself was not a disclaimer; this was the initial determination of the issue of whether arbitration should be stayed for a UDAP claim; the court may have had some compunction whether Section 2-316A should apply at all to what was essentially a contractor's dispute;

331. Regulation VII B, 20 Code Mass. Regs., Part 5 (1975) (current version at MASS. REGS. CODE tit. 940, § 3.08(2) (1986)).

In *Maillet v. AFT-Davidson Co.*, 407 Mass. 185, 552 N.E.2d 95 (1990), the court noted a defendant's argument that the regulation was beyond the authority of the Attorney General to promulgate because it automatically imposed liability for every breach of warranty but declined to decide the issue because the facts of the case went beyond automatic liability. *Id.* at 190 n.7, 552 N.E.2d at 98 n.7.

332. *Hannon*, 385 Mass. at 825-27, 434 N.E.2d at 618-19.

333. The court thus reduced the attorney fees that had been awarded to the contractor pursuant to contract terms to deny recovery for fees related to forcing arbitration and introduction of evidence of arbitration in the trial. *Id.* at 828, 434 N.E.2d at 619-20.

334. *Id.* at 824, 434 N.E.2d at 617-18 (emphasis added).

335. *Id.* at 824-25, 434 N.E.2d at 618.

and the facts showed the buyer was at fault.³³⁶

7. Mississippi

Mississippi has been a total ban state since 1987. Initially, the approach taken was simple: UCC Section 2-316 was not enacted. But this created considerable uncertainty. Early commentators noted two possible meanings of the deletion: (1) disclaimers would still be allowed but without the requirements of conspicuousness and the specific mention of "merchantability," or (2) disclaimers would be totally prohibited.³³⁷

This debate was partly resolved in 1976 by adoption of a statute outside the UCC that prohibited any "limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose"³³⁸ and an amendment to UCC Section 2-719(4) that prohibited "[a]ny limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose."³³⁹

The courts construed these provisions broadly. In *Massey-Ferguson v. Evans*,³⁴⁰ for example, the court held that the provisions negated an "as is" disclaimer on used farm equipment.³⁴¹ In *Beck Enterprises v. Hester*,³⁴² the court again noted that the provisions applied to used goods.³⁴³ More recently, the court asserted, in another used car case, that "the implied warranty of merchantability may not be waived or disclaimed."³⁴⁴

Another implication of the impact of the anti-disclaimer provisions is suggested in *Hester*. The used car express warranty there required some co-payment by the buyer.³⁴⁵ Inasmuch as the buyer was awarded damages for repairs made to the vehicle, it seems reasonable to conclude

336. *Id.* at 814-20, 434 N.E.2d at 612-16.

337. Clark & Davis, *supra* note 324, at 584.

338. MISS. CODE ANN. § 11-7-18 (Supp. 1988).

339. *Id.* § 75-2-719(4) (1972).

340. 406 So. 2d 15 (Miss. 1981).

341. *Id.* at 18-19.

342. 512 So. 2d 672 (Miss. 1987).

343. *Id.* at 675. The Court also noted that the standard of merchantability is different for new and used goods of the same type. Used goods are reasonably expected to require more maintenance and repair and their quality should not be measured on the same scale as that of new goods. Used goods should be compared to similar used goods. If they conform to the quality of other similar used goods, they will normally be merchantable.

Id. at 676.

344. *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725, 728 (Miss. 1991).

345. 512 So. 2d at 674.

that co-payment provisions cannot be applied as against an implied warranty breach. The point, however, is not directly made in the opinion, and recovery also was justified on grounds of fraud.³⁴⁶

In *Briscoe's Foodland, Inc. v. Capital Associates*,³⁴⁷ a commercial equipment lessee argued the anti-disclaimer provisions should invalidate the disclaimer provisions in the lease.³⁴⁸ Concluding that the lease was not the functional equivalent of a sale and that the lessor was really a financier, the court said that the lessor was "not sufficiently like a seller so as to impose Article 2 warranties."³⁴⁹ The concurring opinion explained that since no warranties arose between the financing lessor and the lessee in the transaction, "there was no warranty for section 11-7-18 to save."³⁵⁰ In a subsequent case,³⁵¹ however, the court found a "two party equipment lease" the functional equivalent of a sale and held that provisions of Article 2, therefore, should be applied by way of analogy.³⁵² In applying the Article 2 implied warranty provisions, the court noted:

[W]e confront immediately the language of the contract which provides that there are no such implied warranties in this case. That effort at private law-making in turn is met by Miss. Code Ann. § 11-7-18 (Supp. 1985) which holds inoperative any such disclaimer of warranties.³⁵³

346. *Id.* at 678.

347. 502 So. 2d 619 (Miss. 1986).

348. *Id.* at 620-22. The court's statement of facts more colorfully noted that the lessee had claimed that lessor had "conspired to avoid the availability to [lessee] Briscoe's of access to the implied warranty provisions of" Article 2. *Id.* at 620. Regrettably, there was no direct discussion of this theory in the opinion.

349. *Id.* at 622. The same result obtained in *Capital Assocs. v. Sally Southland, Inc.*, 529 So. 2d 640 (Miss. 1988), in which there was a lease with nearly identical terms involving the same equipment seller and lessor. Although the majority opinion did not cite *Briscoe's*, the dissent contended that the majority "*sub silentio*" had relied on it. *Id.* at 648 (Lee, J., dissenting). More importantly, the dissent argued that the distinctions between two- and three-party leases did not work and that Article 2 provisions should be applied to three-party leases as well. *Id.* (Lee, J., dissenting).

350. *Briscoe's*, 502 So. 2d at 623 (Robertson, J., concurring).

351. *J.L. Teel Co., Inc. v. Houston United Sales*, 491 So. 2d 851 (Miss. 1986). This case was decided after *Briscoe's* even though its opinion appears eleven volumes earlier than the later decision. Presumably the reason for delay was disposition of the motion to reconsider. The *Teel* opinion refers to *Briscoe's* as a recently decided case not yet reported. *Id.* at 855.

352. The two-party terminology is contrasted with what the court referred to as the "three party equipment lease [in *Briscoe's*]" wherein the lessor did not supply the goods but was in substance a financing agency." *Id.* at 855. The court's "totality of the circumstances" approach to functional equivalency applies the kinds of factors usually applied in such cases. It is notable, however, that the court did not require that the circumstances show what is called a lease is actually a sale; it need only be functionally like a sale. Then, Article 2 applies by way of analogy.

353. *Id.* at 859.

The court also said: "For clarity, Section 11-7-18 creates no warranties. It saves warranties otherwise existing."³⁵⁴

In *Fedders Corp. v. Boatright*,³⁵⁵ the court held that the standard provision purporting to limit the duration of the implied warranty of merchantability to the one year express warranty was invalid.³⁵⁶ It also pointed out that Section 11-7-20 "abolished any requirement of privity to maintain an action against the manufacturer for a defective product"³⁵⁷ and that the manufacturer was within the UCC definition of "seller." This followed, the court said, from *Volkswagen of America v. Novak*,³⁵⁸ in which the court had held that the manufacturer, as well as the dealer, was a "seller" under the UCC³⁵⁹ because the sale and warranty "blended into a single unit" and that such sales are usually made "not only upon the make and model of the automobile, but also upon the assurance of the manufacturer, through its warranty, that the vehicle will conform to the standards of merchantability."³⁶⁰

The *Boatright* court also held the manufacturer liable for negligent installation by the dealer, noting that "[i]t could even be said that the proper installation of the machine was but a continuation of the manufacturing process, because until finally installed in place the unit had no usefulness."³⁶¹ This approach was said to apply to a machine that requires special skill to install when the manufacturer had authorized the dealer to make such an installation.³⁶² Finally, the court concluded that this case fell "squarely" under attorney fee provisions of the Magnuson-Moss Act, noting that it is "hard to imagine a case that better exemplifies the type of litigation Congress had in mind when drafting this provision."³⁶³

In 1987, Mississippi adopted a new statute which appears to be modeled on the total ban provisions of Maryland and the District of Columbia.³⁶⁴ The older provisions remain. It seems doubtful that the

354. *Id.*

355. 493 So. 2d 301 (Miss. 1986).

356. *Id.* at 303, 308-09. The court noted: "Significantly, the limited warranty also made note that in some states the limitations on implied warranty as well as on consequential damages were not permitted." *Id.* at 303 n.1. The reference presumably is to the boilerplate permitted by the Magnuson-Moss regulations.

357. *Id.* at 308.

358. 418 So. 2d 801 (Miss. 1982).

359. *Id.* at 804; see MISS. CODE ANN. § 75-2-103(1)(d) (1972).

360. *Volkswagen*, 418 So. 2d at 804.

361. *Boatright*, 493 So. 2d at 307.

362. *Id.* at 307.

363. *Id.* at 312.

364. MISS. CODE ANN. § 75-2-315.1 (1987). It is broader than either Maryland's or the

newer statute will change the results in any of the decided cases. It does, however, clarify matters.

8. Vermont

Vermont adopted a total ban statute in 1972 identical to that in Massachusetts, except that it is confined in application to new and unused goods. It rests on strongly stated judicial policy:

The law does not favor such disclaimers, very likely because they so often play a part in fraudulent or unconscionable transactions. With respect to consumer fraud, such provisions are unenforceable under the Uniform Commercial Code, 9A V.S.A. § 2-316.³⁶⁵

In 1985, the provisions were extended, by virtue of a broadened definition of "consumer," to apply to leases and also to persons who operate a farm even if it is conducted as a business.³⁶⁶ In *Christie v. Dalmig*,³⁶⁷ the court said that the total ban provisions would override the waiver by inspection provisions of UCC Section 2-316(3)(b).³⁶⁸ Other cases dealing with the provisions have revealed little about the application and scope of the statute. Most of the cases have gone no farther than to determine whether the sale involved a consumer transaction.³⁶⁹

District of Columbia's statute because it does not have their exemption from remedy limitations for a manufacturer who maintains in-state repair facilities. Its older vehicle exemption also tolerates more miles (75,000 compared to 60,000) on a used car before the statutory exception kicks in. *Id.*

365. *Lectro Management, Inc. v. Freeman, Everett & Co.*, 135 Vt. 213, 216, 373 A.2d 544, 546 (1977).

366. VT. STAT. ANN. tit. 9, § 2451A(a) (Supp. 1992).

367. 136 Vt. 597, 396 A.2d 1385 (1979).

368. *Id.* at 599, 396 A.2d at 1387. The court did not decide whether those provisions would have applied to these facts. Plaintiffs had purchased a fiberglass tub and shower unit from defendant. It was packaged in two cardboard boxes that were loaded in the back of plaintiff's pickup truck. A dispute arose whether the goods were cracked on the ride home or had been cracked at the time plaintiffs took delivery. *Id.* at 598, 396 A.2d at 1386-87. It seems unlikely that subsection (3)(b) would apply here anyway.

369. See *Corey v. Furgat Tractor & Equip., Inc.*, 147 Vt. 477, 477-79, 520 A.2d 600, 601 (1986) (holding that tractor purchased for logging business was not consumer good); *Murray v. J. & B. Int'l Trucks, Inc.*, 146 Vt. 458, 469-70, 508 A.2d 1351, 1358 (1986) (holding that truck purchased for logging business was not a consumer good); *Barrett v. Adirondack Bottled Gas Corp.*, 145 Vt. 287, 293-94, 487 A.2d 1074, 1077-78 (1984) (holding that absentee landlord buying propane tank for apartment complex was not a consumer); *Lectro Management*, 135 Vt. at 216-17, 373 A.2d at 546 (1977) (holding that complex office equipment was not consumer goods). The court looked for help in construing the somewhat confusing definition of "consumer" to § 9-109 and said that goods were to be classified "according to the use to which they are put by the consumer." *Barrett*, 145 Vt. at 294, 487 A.2d at 1078.

9. West Virginia

In 1974, West Virginia adopted a comprehensive Consumer Credit and Protection Act based largely on the National Consumer Act.³⁷⁰ Its sales provisions included abolishing privity, a total ban against disclaimer and remedy limitations regarding implied warranties, and remedy limitations regarding express warranties in consumer transactions.³⁷¹

The privity provisions have been construed expansively in tandem with UCC Section 2-318,³⁷² despite some early concern by commentators revolving around the definition of "consumer," which refers to one "to whom a sale is made."³⁷³ The same commentators expressed concern that the failure to define the word "merchant," which appears in the anti-disclaimer provisions, might result in the conclusion that the provisions would not apply to manufacturers.³⁷⁴

Language in one decision³⁷⁵ could be read—but only by unreasonable implication—to permit a limitation of the duration of implied warranties. The court said that the warranty at issue "did not attempt to exclude implied warranties"; rather, it limited them to the duration of the express warranty.³⁷⁶ The court then noted that the fire had occurred during the twelve month period of the express warranty: "[T]hus, the implied warranties of merchantability and fitness apply."³⁷⁷ Given the facts of the case, this should probably be construed simply to mean that the breach occurred during the stated period of the express and implied warranties. It seems unlikely that the court meant to imply that the implied warranty *could* be limited to the duration of the express warranty. The statutory language would seem to bar such a result.³⁷⁸

370. There is an excellent description of the West Virginia statute and its background in Card, *supra* note 20, at 411-15. Card also includes a very helpful discussion of the drafting of the National Consumer Act. See *id.* at 408-09.

371. W. VA. CODE §§ 46A-6-107 to -6-108 (1986) were borrowed respectively from NATIONAL CONSUMER ACT §§ 3.302, 3.304 (1970).

372. Taylor v. Ford Motor Co., 185 W. Va. 518, 520-21, 408 S.E.2d 270, 271-74 (1991); Dawson v. Canteen Corp., 158 W. Va. 516, 519, 212 S.E.2d 82, 83-84 (1975); see Card, *supra* note 20, at 497-501.

373. W. VA. CODE § 46A-6-102(b) (1992).

374. See Card, *supra* note 20, at 497-501; Stowers, *supra* note 56, at 335-37.

375. Anderson v. Chrysler Corp., 184 W. Va. 641, 403 S.E.2d 189 (1991).

376. *Id.* at 648, 403 S.E.2d at 196.

377. *Id.*

378. See Fedders Corp. v. Boatright, 493 So. 2d 301, 308 (Miss. 1986) (refusing to limit term of implied warranty to that of express warranty); see *supra* notes 355-63 and accompanying text (discussing Boatright).

10. Alabama

The Alabama provision is the most specific of those considered. Its unique addition to UCC Section 2-316³⁷⁹ was part of a package of nonuniform provisions added upon initial adoption of the Code "to expand the right of the consumer in personal injury cases."³⁸⁰ As a package,³⁸¹ these Alabama provisions have been influential in the adoption of liberal approaches in personal injury cases to issues of products liability generally,³⁸² statutes of limitations, privity, and requirements for giving notice of breach,³⁸³ but they do not seem to have had any influence in other kinds of cases.

B. Statutes Requiring Greater Particularity for Disclaimers Without Other Provisions

1. South Carolina

The unique South Carolina Section 2-316(2) provides that the language of disclaimers of implied warranties must be specific, and, if the included language creates an ambiguity in the contract, it should be resolved against the seller.³⁸⁴ One case provides a clear illustration.³⁸⁵ Placing a disclaimer of implied warranties under the bold heading "TERMS OF WARRANTY" "creates an ambiguity and is likely to fail to alert the consumer that an exclusion of the warranty was intended."³⁸⁶ The disclaimer therefore was held to be ineffective.

The South Carolina Court of Appeals has indicated that a similar result could obtain in a commercial case. However, although the court indicated that a disclaimer was misleading because the heading simply read "WARRANTY," and that the language, which appeared on page seventeen of a twenty-two page agreement, was not conspicuous and did

379. ALA. CODE § 7-2-316(5) (1991). The subsection reads: "Nothing in subsection (2) or subsection (3)(a) or in section 7-2-317 shall be construed so as to limit or exclude the seller's liability for damages for injury to the person in the case of consumer goods." *Id.*

380. *Bishop v. Sales*, 336 So. 2d 1340, 1345 (Ala. 1976).

381. The provisions are discussed in *Atkins v. American Motors Corp.*, 335 So. 2d 134, 141-42 (Ala. 1976).

382. *E.g., id.*

383. *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979); *Bishop*, 336 So. 2d at 1345.

384. S.C. CODE ANN. § 36-2-316 (Law. Co-op. 1976).

385. *Hartman v. Jensen's, Inc.*, 277 S.C. 501, 289 S.E.2d 648 (1982).

386. *Id.* at 503, 289 S.E.2d at 649. The opinion did not contain the language of the attempted disclaimer. The court cited two cases from other jurisdictions that reached a similar result without the aid of such a statute. *Id.* (citing *Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 108-09, 437 S.W.2d 459, 463 (1969); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 391-92, 268 A.2d 345, 350 (1970)).

not mention "merchantability," it nevertheless was effective because the disclaimer language had been negotiated expressly.³⁸⁷ During the lengthy period of negotiations, the buyer had objected to the language but agreed after the seller refused to contract without it.³⁸⁸ The court said that these "circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made" under South Carolina Code Section 2-316(3)(a), and hence the language was effective.³⁸⁹ The court might also have concluded that the language was conspicuous because it was part of a type-written, fully negotiated contract.³⁹⁰

The federal district court had much less trouble in another case involving a disclaimer of implied warranties which appeared in a separate paragraph written in all capital letters. The court found full compliance with UCC disclaimer requirements.³⁹¹ In addition, although these facts were not tied explicitly into the conclusion of conspicuousness, the situation of the case was "one in which all prior negotiations, demonstrations, the 'conditional' lease, and the experiments, culminated in two outright sales whose terms were put into a final written expression."³⁹²

In another federal court decision, the court, without reference to the special South Carolina amendments to Section 2-316, held that a disclaimer of non-distinct color and type buried in a lengthy paragraph of an agreement seven pages long was not conspicuous.³⁹³ Perhaps the disposition should not have been so summary. Since the agreement was typed on legal size paper, it may have been negotiated. The opinion is silent, however, as to the circumstances of negotiations other than to indicate that the sale had been arranged by an intermediary who signed as a witness. The disclaimer paragraph also excluded all consequential damages and required that any lawsuit founded in express warranty be brought within six months of execution of the contract.³⁹⁴

2. Washington

The Washington provision resulted from the pre-UCC decision of

387. *South Carolina Elec. & Gas Co. v. Combustion Eng'g*, 283 S.C. 182, 189, 322 S.E.2d 453, 456 (S.C. App. 1984).

388. *Id.* at 189, 322 S.E.2d at 457.

389. *Id.* at 187, 322 S.E.2d at 456 (quoting S.C. CODE ANN. § 2-316(3)(a) cmt. 6 (Law. Co-op. 1976)).

390. *See id.* at 186, 322 S.E.2d at 456.

391. *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39, 45 (D.S.C. 1974).

392. *Id.* at 44.

393. *Cooley v. Salopian Indus., Ltd.*, 383 F. Supp. 1114, 1118 (D.S.C. 1974).

394. *Id.* at 1117.

Berg v. Stromme,³⁹⁵ which was rooted in very strongly worded public policy. In *Stromme* the court noted:

The record shows that the parties reached an agreement as to the size, style, color, power and model of the automobile; they agreed, item by item, on the kinds of extra equipment to be added to and made a part of the new car and the price the buyer would pay for each one. The record does not show that they ever discussed, contemplated or agreed that the buyer intended to waive his right to delivery of a new car of merchantable quality, nor that the seller, aside from the printed statements, intended to exact such a waiver. . . . Such waiver, even though printed, should not be allowed to arise from the fine print to haunt the buyer of a new car unless he has agreed to be bound by it with the same degree of explicitness that he bound himself to the other vital conditions of the contract of purchase.³⁹⁶

Accordingly, a disclaimer of the implied warranty of merchantability is ineffective unless: (1) it was negotiated explicitly between the buyer and seller, and (2) it sets forth with particularity the qualities and characteristics that are not warranted.³⁹⁷ Later cases have made it clear that the burden of proof is on the seller to establish the validity of any disclaimer.³⁹⁸

It is important to note that although the *Stromme* rule arose from a consumer context, its language was not so confined, and the courts, until recently, regularly applied it to commercial transactions. This, of course, obviated any need to draw definitional lines around consumer transactions. The commercial application continued even after the second requirement—requiring disclosure with particularity of qualities and characteristics not warranted—was codified in 1974 by an amendment to Section 62A.2-316(4) for consumer purchase transactions.³⁹⁹ Moreover,

395. 79 Wash. 2d 184, 484 P.2d 380 (1971). The case was decided after adoption of the Code, but it involved a purchase made before adoption. The decision made no reference to the Code.

396. *Id.* at 193-94, 484 P.2d at 385.

397. *Miller v. Badgley*, 51 Wash. App. 285, 293, 753 P.2d 530, 535 (1988) (citing *Thomas v. Ruddell Lease-Sales*, 43 Wash. App. 208, 213, 716 P.2d 911, 914 (1986)); see *Stromme*, 79 Wash. 2d at 196, 484 P.2d at 386.

398. *Miller*, 51 Wash. App. at 293, 753 P.2d at 534 (relying on *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wash. App. 892, 491 P.2d 241 (1971)).

399. Act of May 5, 1974, ch. 180, 1974 Wash. Laws 642 (1st Ex. Sess.). Earlier in the same session, the requirements also had been applied to leases and to purchases for commercial or business uses. Act of Feb. 16, 1974, ch. 78, 1974 Wash. Laws 167 (1st Ex. Sess.). Two months later, however, those broad applications were deleted and the requirements confined to consumer purchase transactions. Act of May 5, 1974, ch. 180, 1974 Wash. Laws 642 (1st Ex. Sess.). None of the cases have referred to this brief but interesting history. Several cases have

the cases acknowledge that the first requirement—that a disclaimer be negotiated explicitly—has continued as a matter of common law.⁴⁰⁰ The statutory provision as such, therefore, was of little importance, and there is a strong aspect of common-law evolution in the decisions.

The cases have given some content to the *Stromme* requirements. The explicit negotiation component has been explained in several different ways. Thus, a disclaimer is ineffective if it “was never brought to the plaintiff’s attention,”⁴⁰¹ or if “[t]here were no discussions, no bargaining, no negotiations, and no agreements” as to the clause.⁴⁰² It follows, a fortiori, as held in another case, that “[a] disclaimer made after a sale is completed cannot be effective because it was not a part of the bargain between the parties.”⁴⁰³ This is so even if the clause is in a writing sent to buyer and signed by him after an oral contract had been made.⁴⁰⁴ Even “actual knowledge of the disclaimer is insufficient to give it effect.”⁴⁰⁵ Further, the required agreement cannot be provided by the application of Section 2-207, which in other contexts as a matter of law may make terms in a written confirmation a part of a contract.⁴⁰⁶

It is clear, at least in a consumer case, that the explicit negotiation must relate to the disclaimer clause. Thus, in one case the court emphasized that there was no evidence of any negotiations regarding a disclaimer.⁴⁰⁷ Moreover, the fact that the contract had been drafted by an attorney mutually chosen by the parties did not change the situation.⁴⁰⁸

applied sales law rules to lease transactions. See, e.g., *Baker v. City of Seattle*, 79 Wash. 2d 198, 201, 484 P.2d 405, 407 (1971) (holding that one cannot properly distinguish between sale and rental of chattel).

400. The court in *Hartwig Farms Inc. v. Pacific Gamble Robinson Co.*, 28 Wash. App. 539, 625 P.2d 171 (1981), noted: “In response to *Berg v. Stromme*, . . . RCW 62A.2-316 was amended in 1974 to require particularity in consumer, i.e., noncommercial, transactions. There was no change, however, in the requirement that a disclaimer must be negotiated in order to be effective.” *Id.* at 242-43 n.5, 625 P.2d at 173 n.5 (citation omitted); see also *Thomas*, 43 Wash. App. at 213-14, 716 P.2d at 915 (stating that the disclaimer still must be negotiated).

401. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 46, 554 P.2d 349, 355 (1976).

402. *Rottinghaus v. Howell*, 35 Wash. App. 99, 104, 666 P.2d 899, 903 (1983).

403. *Hartwig Farms*, 28 Wash. App. at 543, 625 P.2d at 173 (holding that disclaimer on wholesaler’s invoice sent after oral contract and a written confirmation that did not contain the disclaimer is not effective).

404. *Rottinghaus*, 35 Wash. App. at 106-07, 666 P.2d at 905.

405. *Id.*; *Hartwig Farms*, 28 Wash. App. at 545, 625 P.2d at 175; see also *Miller v. Badgley*, 51 Wash. App. 285, 294, 753 P.2d 530, 535 (1988) (stating that knowledge of a disclaimer is ineffective “absent negotiation and agreement”).

406. *Rottinghaus*, 35 Wash. App. at 105-06, 666 P.2d at 904-05; *Hartwig Farms*, 28 Wash. App. at 543-44, 625 P.2d at 174.

407. *Miller*, 51 Wash. App. at 293, 753 P.2d at 535.

408. *Id.* at 294, 753 P.2d at 535.

In several cases, the explicit negotiation requirement has been used in tandem with the requirement that any qualities or characteristics being disclaimed be set forth with particularity. This is particularly evident in a consumer case involving a used Corvette.⁴⁰⁹ The salesman pointed out the following statement in the purchase order and requested that the consumer initial it: "I understand you don't provide any warranties whatsoever, and the auto is sold as is and with all defects."⁴¹⁰ He then "explained that this provision would protect Lease-Sales [seller] from complaints of engine problems from buyers who would punishingly drive a high-performance sports car like the Corvette. No other specifics were discussed. Thomas (consumer) then initialed the disclaimer."⁴¹¹ The court held the evidence fully supported the finding that the seller had "neither negotiated the disclaimer of warranty nor informed Thomas [buyer] correctly as to the qualities and characteristics intended to be excluded by the disclaimer. On the contrary, he was told that the disclaimer referred only to engine wear that might occur through his misuse of the vehicle."⁴¹²

"In its present condition" is a litigious clause in many jurisdictions, there being a split of authority whether it is sufficiently similar to "as is" to constitute a disclaimer of implied warranties.⁴¹³ It clearly is not sufficient to satisfy the Washington particularity requirement.⁴¹⁴ It is likely, in fact, that the classic "as is" clause itself fails the test because it is too generic to set forth the required particulars.⁴¹⁵ That is also true of a clause that explicitly attempts to disclaim all express and implied warranties.⁴¹⁶

The particularity requirement also has been used in circumstances

409. *Thomas v. Ruddell Lease-Sales*, 43 Wash. App. 208, 213, 716 P.2d 911, 914 (1986).

410. *Id.* at 210, 716 P.2d at 912-13.

411. *Id.* at 210, 716 P.2d at 913.

412. *Id.* at 214, 716 P.2d at 915.

413. See the brief discussion in *Miller v. Badgley*, 51 Wash. App. 285, 292-93, 753 P.2d 530, 534 (1988).

414. *Id.* at 294, 753 P.2d at 535.

415. This seems to be a reasonable reading of *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wash. App. 208, 716 P.2d 911 (1986). The case does not squarely present the issue, however, because the salesman's "explanation" misrepresented the provision. *Id.* at 210, 716 P.2d at 913.

416. *Rottinghaus v. Howell*, 35 Wash. App. 99, 104, 666 P.2d 899, 903 (1983). The disclaimer in this case provided in part:

LIMITATION OF WARRANTY AND REMEDY

Since the use, crop, yields or quality of certified seed potatoes is beyond the control of the producer, the seller, the inspector, or the Montana Potato Improvement Association, after loading for shipment, no warranty of any kind, express or implied, including merchantability, which extends beyond the description on the face of this tag is made concerning the performance or quality of these seed potatoes.

that would have required proof of fraud or misrepresentation in other jurisdictions. Thus, one of the reasons given for the invalidity of a disclaimer in a used car case was the seller's failure to disclose that the car previously had been used for racing.⁴¹⁷

The most pronounced change in the *Stromme* rule over the years has been in its application to commercial transactions. In some of the earlier cases, the application in the commercial context was explicit. Thus, in 1975 the Washington Supreme Court⁴¹⁸ said that the *Stromme* disclaimer rule is not limited to consumer cases, noting that it had been applied to a commercial transaction in a 1971 court of appeals decision.⁴¹⁹ Moreover, the court went further to apply the *Stromme* policy to clauses excluding consequential damages even when both parties are business people.⁴²⁰ In that limitation of damages context, the *Stromme* disclaimer criteria were not determinative as to the validity of such a clause but were relevant in applying the unconscionability test of Section 2-719(3).

A year later, the court of appeals in a consumer case suggested that the rule would be applied differently to negotiated commercial contracts.⁴²¹ In two later cases, however, the rule was applied in a commer-

Id. at 102 n.2, 666 P.2d at 902 n.2. The disclaimer was also ineffective because of lack of negotiation. *Id.* at 104, 666 P.2d at 903.

417. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 44, 554 P.2d 349, 354 (1976). The disclaimer also was ineffective because it had not been negotiated explicitly. *Id.* at 46, 554 P.2d at 355. In some jurisdictions, it is an unlawful trade practice not to disclose "any known material defect or material nonconformity." See, e.g., OR. REV. STAT. § 646.608(1)(t) (1991). Thus, failure to disclose that a car had been in an accident and repaired may be such a practice even where the sale has been made on an "as is—no warranty" basis. *Hinds v. Paul's Auto Werkstatt, Inc.*, 107 Or. App. 63, 65-66, 810 P.2d 874, 874 (1991) (applying OR. REV. STAT. § 646.608(1)(t) (1991)).

418. *Schroeder v. Faegol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

419. *Id.* at 261, 544 P.2d at 24 (citing *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 200, 491 P.2d 1346, 1349 (1971)) (involving liability of herbicide dealer to farmer and manufacturer to dealer; comments made in latter context).

420. *Id.* at 261, 544 P.2d at 24. The court noted that the public policy underlying *Stromme* previously had been extended to exclusionary clauses in a case involving an injured consumer, *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971), which was handed down the same day as *Stromme*. *Schroeder*, 86 Wash. 2d at 261, 544 P.2d at 24. In *Baker*, the court held that one cannot properly distinguish between the sale and rental of a chattel. *Baker*, 79 Wash. 2d at 201, 484 P.2d at 407. Hence, the policy underlying the disclaimer and exclusion of consequential damages rules of Article 2 should apply to lease transactions. Noting that the disclaimer for the lease of a golf cart was "contained in the middle of the agreement and was not conspicuous," the court overruled a prior case and held it would be unconscionable to permit the clause to exclude recovery for personal injuries suffered by the lessee. *Id.* at 202, 484 P.2d at 407.

421. "Although a general disclaimer clause may negate implied warranties if there is a negotiated contract between a commercial seller and a commercial buyer, it is not appropriate to a consumer sale." *Testo*, 16 Wash. App. at 349, 554 P.2d at 355.

cial context with no hint of different treatment.⁴²² Indeed, the commercial context was underscored by the holding in both cases that the written confirmation provisions of Section 2-207 cannot be used to supply the negotiated agreement necessary for an effective disclaimer under the rule, even, as in one of the decisions, where the confirmation was signed by the affected party.⁴²³ In *Rottinghaus*, the court also clearly applied that part of the rule which requires that qualities and characteristics being disclaimed must be set forth with particularity.⁴²⁴ Several cases since then, however, have set a different tone that eventually might affect the approach in consumer cases.

The first case in which the supreme court backed off from a literal application of *Stromme* in a commercial context involved not a sale of goods but rather the sale of an apartment complex.⁴²⁵ As the court emphasized, the buyer had sought the deal for tax reasons from a seller who was building the complex for its own use and management and not for purposes of resale.⁴²⁶ Moreover, the buyer was fully represented by counsel.⁴²⁷ The court found *Stromme* inapplicable:

[In *Stromme*] we held that the communicated particular needs of the buyer of an automobile would not be overcome by a boiler-plate exclusion of all warranties, express or implied. That case is quite different from this where the buyers sought no promises, the sellers made none, and the buyers with their lawyer, faced a clause which said the sellers not only made no covenant about the condition of the buildings, but expressly disclaimed any such covenant.⁴²⁸

In a later decision, the court characterized this case as holding that "explicit negotiation is not required to give effect to a disclaimer in a contract for the commercial sale of an apartment complex."⁴²⁹ It then declined to "extend" the *Stromme* rules to an auction sale of a race horse.⁴³⁰ It found a strong contrast on these facts to both the nature of

422. *Rottinghaus v. Howell*, 35 Wash. App. 99, 666 P.2d 899 (1983); *Hartwig Farms v. Pacific Gamble Robinson*, 28 Wash. App. 539, 625 P.2d 171 (1981).

423. *Rottinghaus*, 35 Wash. App. at 106-07, 666 P.2d at 904, 905; see *Hartwig Farms*, 28 Wash. App. at 543-44, 625 P.2d at 174.

424. *Rottinghaus*, 35 Wash. App. at 103, 666 P.2d at 903.

425. *Frickel v. Sunnyside Enters., Inc.*, 106 Wash. 2d 714, 715, 725 P.2d 422, 423 (1986).

426. *Id.* These facts were also the basis for the holding that the implied warranty of habitability did not arise in the transaction.

427. *Id.* at 715, 725 P.2d at 423.

428. *Id.* at 721, 725 P.2d at 426.

429. *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wash. 2d 396, 402, 759 P.2d 418, 421 (1988).

430. *Id.* at 403, 759 P.2d at 422. The court noted that the amendment to WASH. REV. CODE § 62A.2-316, which provides that there are no implied warranties that livestock are free

the bargaining and the format of the contract in *Stromme*.⁴³¹

The court highlighted the fact that the front side of the order form in *Stromme* contained handwritten notations of explicitly negotiated components of the sale, while the language of disclaimer was buried on the back in a printed mass.⁴³² In contrast, in a horse auction sale there is only negotiation over price, and the trade custom is that conditions announced at the auction are binding even if the bidder has no knowledge of them. Moreover, the disclaimer disclosures were "visible, readable, and contained in the sale booklet,"⁴³³ and the bill of sale "was on a single page, easy to read, and understandable."⁴³⁴

Largely on the basis of these decisions, a federal district court more recently concluded that neither of the components of *Stromme* apply to a commercial transaction.⁴³⁵ This conclusion seems overly broad and facile. The Washington Supreme Court decisions on which the district court relied did not reach such a generic conclusion.⁴³⁶ Rather, they turned on the nature of the relationship between buyer and seller, the character of the sale and the seller, the form of the contract, and, in one of the cases, the fact that the buyer was represented by counsel.⁴³⁷ It seems likely that this factual analysis approach will continue, possibly creeping into the consumer cases. It is, however, abundantly clear that those cases almost certainly will continue what is in effect a presumption against the validity of a disclaimer in consumer transactions.

from sickness or disease, did not apply to the case because it was adopted after the case arose. *Travis*, 111 Wash. 2d at 405, 759 P.2d at 423.

431. *Travis*, 111 Wash. 2d at 402-03, 759 P.2d at 421.

432. *Id.* at 402-04, 759 P.2d at 421-22.

433. *Id.* at 404, 759 P.2d at 422.

434. *Id.* at 403, 759 P.2d at 421.

435. *United Van Lines v. Hertz Penske Truck Leasing*, 710 F. Supp. 283, 286 (W.D. Wash. 1989).

436. See, e.g., *Travis*, 111 Wash. 2d 396, 759 P.2d 418 (1988); *Frickel v. Sunnyside Enters., Inc.*, 106 Wash. 2d 714, 725 P.2d 422 (1986). The court also relied on *Hartwig Farms* for the proposition that an exclusion of warranty need not be explicitly negotiated. *Hartwig Farms, Inc. v. Pacific Gamble Robinson*, 28 Wash. App. 539, 541-42, 625 P.2d 171, 175 (1981). But the *Hartwig Farms* court said that "[w]ithout negotiation and agreement, no disclaimer, including the present one, can be effective." *Id.* at 545, 625 P.2d at 175. *United Van Lines* also cited *Hartwig Farms* for the proposition that the requirement of particularity for disclaimer does not apply to commercial transactions because the *Hartwig Farms* court did not discuss it in finding the disclaimer ineffective. *United Van Lines*, 710 F. Supp. at 286. There was in *Hartwig Farms*, however, no need to discuss particularity because the disclaimer was otherwise ineffective.

437. See *Travis*, 111 Wash. 2d at 402-04, 759 P.2d at 421-22; *Frickel*, 106 Wash. 2d at 715-21, 725 P.2d at 423-26.

C. The Song-Beverly and Copycat States

1. Minnesota

Litigation in Minnesota regarding consumer goods has not involved a construction of the statute other than the attorney fee provisions.⁴³⁸ These provisions are the product of a sequence of statutory sections that make violation of the Act a violation of the Consumer Fraud Act⁴³⁹ for which, in a separate chapter, attorney fees are permitted.⁴⁴⁰ The Minnesota Supreme Court squarely affirmed that sequence, holding that "[a]s a matter of law, the breach of the express warranty so found constitutes a violation of the consumer protection act for which attorney's fees are recoverable."⁴⁴¹ This appeared to make the award of attorney fees routine⁴⁴² in consumer warranty cases involving statutory violations.⁴⁴³

A more recent court of appeals decision involving a consumer fraud act violation for misrepresentation in the sale of real estate,⁴⁴⁴ and an unpublished decision by the same judge in a consumer warranties case,⁴⁴⁵ have given greater emphasis than the earlier cases to the permissive character of an attorney fee award and set forth criteria which, if continued, could result in constricting attorney fees in warranty cases. The opinions

438. The facts in an unpublished opinion, *Goodlow v. Winnebago Indus., Inc.*, No. CX-89-1300, 1989 WL 151871 (Minn. Ct. App. Dec. 19, 1989), raise the issue of the application of disclaimer restrictions to manufacturers, but the court did not discuss the issue. Although the dealer had disclaimed all warranties in the purchase agreement, the court simply concluded that the disclaimer complied with UCC § 2-316 and made no reference to the disclaimer provisions in MINN. STAT. ANN. § 325G.18 (West 1946). *Goodlow*, 1989 WL 151871, at *3. The court's inattention to the question may have been influenced by the fact that the plaintiffs had already reached a settlement with the manufacturer of the goods. Perhaps counsel did not deal with the question. It is discussed in the context of similarly worded statutes. See *supra* text accompanying notes 99-102.

439. MINN. STAT. ANN. § 325G.20 (West 1981) provides that a violation of the provisions restricting disclaimers and imposing obligations on express warrantor to honor their express warranties is a violation of § 325F.69.

440. *Id.* § 8.31(3)(a) (West Supp. 1993) provides for attorney fees for violations of § 325F.69.

441. *Jacobs v. Rosemount Dodge-Winnebagos*, 310 N.W.2d 71, 79 (Minn. 1981).

442. See, e.g., *Metag v. K-Mart Corp.*, 385 N.W.2d 864, 867 (Minn. Ct. App. 1986) ("A violation of the consumer warranties act is treated as a violation of the prevention of consumer fraud act."); see also *Yost v. Millhouse*, 373 N.W.2d 826, 831 (Minn. Ct. App. 1985) (citing the Minnesota statute which authorizes recovery of attorneys fees for violations of the Consumer Fraud Statute).

443. See *supra* note 442. A breach of an implied warranty may not be a violation of the Consumer Warranties Act. The focus of the Act is on controlling implied warranty disclaimers and enforcing express warranty obligations.

444. *Liess v. Lindemyer*, 354 N.W.2d 556, 557 (Minn. Ct. App. 1984). The opinion does not set forth any specific facts about the case.

445. *McGill v. Massey-Ferguson, Inc.*, No. C7-88-2776, 1989 WL 3541, at *3 (Minn. Ct. App. Jan. 24, 1989).

refer to cases that encompass a range of issues that have arisen in construing the attorney fee provisions of the civil rights statutes. These included a case in which a party sought fees on the theory that a city's condemnation of property violated the federal civil rights acts,⁴⁴⁶ and another that involved the question of how to apply attorney fee rules when counsel is a legal services organization.⁴⁴⁷ Literal application of the cited criteria, such as the requirement of a policy analysis of "the degree to which the public interest is advanced by the suit,"⁴⁴⁸ could adversely affect the award of attorney fees in these essentially private actions.

The civil rights cases do not involve analogous issues. Moreover, the cross references in the consumer warranties and deceptive fraud acts provide a clear basis for the award of attorney fees. In a very real sense, the statutory pattern itself establishes the "public interest." Additional inquiry seems out of place. So far, none of the cases construing the Consumer Warranties Act have involved the problems concerning award of attorney fees to a legal services organization.⁴⁴⁹

2. New Hampshire

New Hampshire's statute provides that disclaimers are ineffective unless there has been compliance with a rather elaborate statutory formula.⁴⁵⁰ It also largely dispenses with privity requirements in warranty actions⁴⁵¹ and imposes some obligations on manufacturers with respect to honoring warranty obligations.⁴⁵² There are no notable appellate cases construing these provisions.

3. Rhode Island

The Rhode Island statute⁴⁵³ provides that disclaimers of implied warranties are not effective unless there has been compliance with a statutory formula. Although this version does not include one of the ele-

446. *Boland v. City of Rapid City*, 315 N.W.2d 496, 502 (S.D. 1982).

447. *Page v. Preisser*, 468 F. Supp. 399, 399 (S.D. Iowa 1979).

448. *Liess*, 354 N.W.2d at 558.

449. In *Wexler v. Brothers Entertainment Group, Inc.*, 457 N.W.2d 218 (Minn. Ct. App. 1990), the court held that the fact that the plaintiff, a licensed attorney, acted as his own attorney did not preclude a claim for attorney fees in an action under the Consumer Fraud Act. The court also reiterated, but did not apply, the public interest policy factor of *Liess*, but the case did not involve the consumer warranties act. *Id.* at 222-23.

450. N.H. REV. STAT. ANN. § 382-A:2-316(4) (Supp. 1992).

451. *Id.* § 382-A:2-318.

452. *Id.* § 382-A:2-329.

453. R.I. GEN. LAWS § 6A-2-329 (1992).

ments of the California ritual,⁴⁵⁴ it is functionally similar. It also follows the California prohibition against disclaimer of implied warranties when there is an express warranty, but, unlike California, it has not included floor and ceiling limits on the duration of merchantability. There are also less extensive provisions dealing with an express warrantor's obligations to honor express warranties.⁴⁵⁵

In the one case construing the statute, the court implicitly gave a broad reading to "consumer."⁴⁵⁶ The anti-disclaimer provisions in Section 6A-2-329(2)(b) appear to require goods purchased primarily for consumer and not for business purposes.⁴⁵⁷ Without discussion, the court applied the statute where the owner of a corporation purchased a station wagon "to deliver prescriptions, as well as for general transportation."⁴⁵⁸ Since the named plaintiff was the corporation, it seems likely that title had been taken in the name of the corporation. There was no discussion of how much personal use had been made of the vehicle.

The more substantive aspect of the case was the court's interpretation of the disclosure requirements of the statute that must be satisfied to make an effective disclaimer of implied warranties. The dealer's disclaimer provided:

All warranties, if any, by a manufacturer or supplier other than dealer are theirs, *not* dealer's, and only such manufacturer or other supplier shall be liable for performance under such warranties. Unless dealer furnishes buyer with a separate written warranty or service contract made by dealer on its own behalf, dealer hereby disclaims all warranties, express or implied, including any implied warranties of merchantability or fitness for a particular purpose:

(a) On all goods and services sold by dealer, and (b) on all used vehicles which are hereby sold "as is - not expressly warranted or guaranteed."⁴⁵⁹

The court found the language ambiguous on several counts⁴⁶⁰ and there-

454. See CAL. CIV. CODE § 1792.4(a) (West 1985).

455. See *id.* § 1793.3.

456. *East Side Prescription Ctr., Inc. v. E.P. Fournier Co.*, 585 A.2d 1176 (R.I. 1991).

457. R.I. GEN. LAWS § 6A-2-329(2)(a) (1992) refers to a "consumer sale." "Consumer sale" is defined as "a sale of new goods, or as regards an express warranty, any goods, purchased primarily for personal, family, or household purposes, and not for agricultural or business purposes." *Id.* § 6A-2-329(1)(a).

458. *East Side Prescription Ctr.*, 585 A.2d at 1177.

459. *Id.* at 1180.

460. The court found the first two sentences "inconsistent in that one refers to existing warranties and the other disclaims those existing warranties but provides for alternative warranties." *Id.* The remainder was considered "ambiguous on its face in that it disclaims all warranties on 'all goods and services' sold by Fournier and then it employs restrictive language

fore ineffective to disclaim merchantability. It would appear that the court might also have found the language lacking because of its failure to inform the buyer clearly that he bore the entire risk as to quality.⁴⁶¹ The court did, however, note expressly that "the fact that a disclaimer is conspicuous and has been examined by the purchaser is not sufficient to constitute a disclaimer."⁴⁶² Among the cautions one should draw from the decision is that it is dangerous to use a multi-purpose disclaimer clause which purports to leave to the consumer the decision as to which limitation applies to her purchase.

4. California

The statutory provisions are discussed extensively in the text of this Article and are not considered separately here. Given the very comprehensive nature of the Song-Beverly Act, it is surprising how few issues have been considered in the appellate courts. The cases decided to date do not disclose any real problems with the definition of "consumer" under the Act. An unpublished Ninth Circuit Court of Appeals opinion holds that an action may not be maintained under Song-Beverly by a corporation; the definitional provisions limit standing to an "individual."⁴⁶³

One case illustrates the point that the Song-Beverly concept of express warranty is not as expansive as that in the UCC.⁴⁶⁴ Although statements of seaworthiness of a sailboat in literature may constitute an express warranty under Article 2, they do not satisfy the Song-Beverly definition of express warranty that requires a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance."⁴⁶⁵ An implied warranty of fitness may arise under the Consumer Warranty Act, but it did

limiting the disclaimer to 'all used vehicles which are hereby sold "as is—not expressly warranted or guaranteed." ' " *Id.*

461. See R.I. GEN. LAWS § 6A-2-329(2)(b)(ii) (1992).

462. *East Side Prescription Ctr.*, 585 A.2d at 1180.

463. *Blair v. Mercedes-Benz of N.A., Inc.*, 914 F.2d 261 (table, text in WESTLAW), unpublished disposition (9th Cir. (Cal.), Sept. 6, 1990) (No. 89-55486) (applying California law). Song-Beverly grants standing to "[a]ny buyer of consumer goods" who is damaged in a certain way, CAL. CIV. CODE § 1794(a) (West Supp. 1993), and defines "buyer" as any "individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling such goods at retail." *Id.* § 1791(b).

464. *Keith v. Buchanan*, 173 Cal. App. 3d 13, 19-20, 220 Cal. Rptr. 392, 394-95 (1985).

465. CAL. CIV. CODE § 1791.2(a)(1) (West 1985).

not in this case because there was no showing of reliance.⁴⁶⁶

Several cases involving civil penalty questions contained facts that invite some kind of penalty or punitive damages. In one, the plaintiff had a steady stream of problems with her car that kept it in the shop for a total of fifty-five days.⁴⁶⁷ She finally had had enough when, while pregnant, she endured the harrowing experience of having the car die on the railroad tracks. Considering the car unsafe, she asked for a refund.⁴⁶⁸ When it was refused, she used all her savings to buy another car and then sued and asked for a civil penalty.⁴⁶⁹ The Act provides that a judgment may include civil penalties up to twice the actual damages "if the buyer can establish that the failure to comply was willful."⁴⁷⁰ The trial court had instructed the jury that "willful" connotes knowing or reckless disregard of the consumer's rights.⁴⁷¹ This was held to require too much. The instructions should have explained that "a civil penalty could be awarded to plaintiff if the jury determined that Ford knew of its obligations but intentionally declined to fulfill them."⁴⁷² The court endorsed the following quotation from another case: "It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."⁴⁷³ The court also held that the instructions should have made clear that a civil penalty can be awarded for failure to comply either with the obligations of Song-Beverly *or* of an express or implied warranty.⁴⁷⁴

*Troensegaard v. Silvercrest Industries, Inc.*⁴⁷⁵ had facts that strongly invited punitive damages. Plaintiff was an eighty-two year old widow who developed headaches and eye, nose, and throat irritation from the formaldehyde fumes exuded from her new mobile home.⁴⁷⁶ The retailer representative who responded to her complaints developed "headaches and nausea" after twenty to thirty minutes in the mobile home.⁴⁷⁷ Both

466. *Keith*, 173 Cal. App. 3d at 25-26, 220 Cal. Rptr. at 399.

467. *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 883, 263 Cal. Rptr. 64, 66 (1989).

468. *Id.*

469. *Id.*

470. CAL. CIV. CODE § 1794(c) (West Supp. 1993). The provisions of CAL. CIV. CODE § 1794(e)(1), which do not require a showing of willfulness in an automobile case to obtain a civil penalty, were adopted in 1987, to be effective in 1988, and were not applicable to this case. *Ibrahim*, 214 Cal. App. 3d at 884 n.5, 263 Cal. Rptr. at 67 n.5.

471. *Ibrahim*, 214 Cal. App. 3d at 893-94, 263 Cal. Rptr. at 73.

472. *Id.* at 895, 263 Cal. Rptr. at 74.

473. *Id.* at 894, 263 Cal. Rptr. at 74 (quoting *May v. New York Motion Picture Corp.*, 45 Cal. App. 396, 404, 187 P. 785, 788 (1920)).

474. *Id.*

475. 175 Cal. App. 3d 218, 220 Cal. Rptr. 712 (1985).

476. *Id.* at 223-24, 220 Cal. Rptr. at 715.

477. *Id.*

plaintiff and the retail representative notified the manufacturer, which did not reply but instead hired an engineering firm that tested and found high formaldehyde concentrations.⁴⁷⁸ However, the manufacturer not only did not disclose the report or its results, but it performed only minimal repairs that it knew would not remedy the problem.⁴⁷⁹ The jury awarded \$90,000 in compensatory damages, \$55,000 in punitive damages, and a \$90,000 Song-Beverly civil penalty. The trial court added attorney fees and costs.⁴⁸⁰

The mobile home warranty complied with the express warranty required by statute⁴⁸¹ that it be free from substantial defects in material or workmanship.⁴⁸² The statutory obligation of the manufacturer is to correct any defects that become apparent within one year from the date of delivery to the buyer.⁴⁸³ A manufacturer's "willful" failure to do so triggers the civil penalty provisions of Song-Beverly.⁴⁸⁴ The appellate court agreed that the trial court's finding that the manufacturer's concealment of the chemical levels and its failure to cure the problem constituted "oppression, fraud, or malice" in "disregard to plaintiff's rights" justified an award of punitive damages.⁴⁸⁵ Likewise, the refusal to correct the problem and the concealment of the defective condition constituted "willful" conduct within the meaning of the civil penalty provisions.⁴⁸⁶ However, the court concluded that plaintiff could not have both forms of damages. In the view of the majority, both are punitive damage awards, and if the legislature had intended to permit recovery of both, it would have said so.⁴⁸⁷ Moreover, the majority concluded, a plaintiff who seeks a civil penalty and attorney fees and expenses under Song-Beverly has "elected to waive punitive damages under section 3294."⁴⁸⁸

The dissent disagreed sharply. The punitive damages award "was

478. *Id.*

479. *Id.*

480. *Id.* at 221, 220 Cal. Rptr. at 713.

481. CAL. CIV. CODE §§ 1797-1797.5 (West 1985).

482. The full text of the warranty is not set forth in the opinion. The court did say, however, that "[t]he purchase was attended by Silvercrest's express warranty that it was 'free from any substantial defects in materials or workmanship' as required by Civil Code 1797.3." *Troensegaard*, 175 Cal. App. 3d at 223, 220 Cal. Rptr. at 715.

483. CAL. CIV. CODE § 1797.3(b) (West 1985). The buyer must give written notice to the manufacturer within one year and ten days after receiving delivery. Repairs are to be made at the buyer's site. *Id.*

484. *Id.* § 1794(c). The buyer may recover as much as twice the actual damages in addition to the compensatory damages. *Id.*

485. *Troensegaard*, 175 Cal. App. 3d at 226, 220 Cal. Rptr. at 716-17.

486. *Id.* at 226, 220 Cal. Rptr. at 717.

487. *Id.* at 226, 220 Cal. Rptr. at 718.

488. *Id.*

based not on the same conduct . . . but on the separate and distinct theory of fraudulent concealment of the unfavorable EAL report; and the jury so specially found."⁴⁸⁹ Each award "rests on a separate factual basis and legal theory."⁴⁹⁰ Moreover, Section 1790.4 provides that remedies under Song-Beverly "are cumulative . . . [to] any remedy that is otherwise available."⁴⁹¹ Finally, the dissent argued that there is no basis to warrant a determination of waiver: "Indeed, waiver of *any* of the provisions of the Act dealing with consumer and mobile home warranties is expressly prohibited as a matter of public policy."⁴⁹²

Another decision, *Gomez v. Volkswagen of America, Inc.*,⁴⁹³ considered the relation between the civil penalty provisions and a tort action for breach of good faith and fair dealing. The court first affirmed that wrongful refusal to fulfill statutory repair and replacement obligations is a willful violation triggering multiple damages.⁴⁹⁴ It then held that the statutory civil penalty provided an adequate remedy and therefore declined to extend the tort remedy for breach of the covenant of good faith and fair dealing to such conduct.⁴⁹⁵

Several cases have involved questions regarding awards of attorney fees. In one case,⁴⁹⁶ plaintiff was awarded the purchase price of the car plus a \$5000 civil penalty for defendant's willful failure to repair or replace.⁴⁹⁷ Plaintiff claimed attorney fees of \$137,000.⁴⁹⁸ The court held that although the language of the act mandates the recovery of costs, including attorney fees,⁴⁹⁹ it "requires payment only of those costs and

489. *Id.* at 230, 220 Cal. Rptr. at 719 (Racanelli, J., concurring in part and dissenting in part).

490. *Id.* (Racanelli, J., concurring in part and dissenting in part).

491. *Id.* (Racanelli, J., concurring in part and dissenting in part) (quoting CAL. CIV. CODE § 1790.4 (West 1985)).

492. *Id.* at 231, Cal. Rptr. at 720 (Racanelli, J., concurring in part and dissenting in part) (referring to CAL. CIV. CODE §§ 1790.1 & 1797.4 (West 1985)).

493. 169 Cal. App. 3d 921, 215 Cal. Rptr. 507 (1985).

494. *Id.* at 925, 215 Cal. Rptr. at 510. The breached obligation was that set forth in CAL. CIV. CODE § 1793.2(b) (West 1985), which requires that repairs be commenced within a reasonable time and ordinarily completed within 30 days.

495. *Gomez*, 169 Cal. App. 3d at 929, 215 Cal. Rptr. at 513.

496. *Levy v. Toyota Motor Sales, U.S.A., Inc.*, 4 Cal. App. 4th 807, 5 Cal. Rptr. 2d 770 (1992).

497. *Id.* at 810, 5 Cal. Rptr. 2d at 771.

498. *Id.*

499. Prior to 1987, the attorney fee provisions in CAL. CIV. CODE § 1794(d) (West 1985) were functionally identical to those in the Magnuson-Moss-Warranty Federal Trade Commission Improvement Act § 110(d)(2), 15 U.S.C. § 2310(d)(2) (1988), that provide for costs and attorney fees to a prevailing consumer "unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." CAL. CIV. CODE § 1794(d) (West 1985). The language of discretion was removed from § 1794(d) in 1987 so that it is, as applied

fees 'determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution' of the underlying action."⁵⁰⁰ Moreover, the facts of the case did not qualify for the more generous computation formula available under the "private attorney general" theory because the action did not enforce an important right affecting the public interest.⁵⁰¹ Accordingly, the trial court properly restricted the amount of attorney fees by application of criteria developed in cases not involving Song-Beverly.⁵⁰²

Song-Beverly does not have its own statute of limitations. In *Krieger v. Nick Alexander Imports, Inc.*,⁵⁰³ the court of appeals concluded that the UCC Article 2 statute should apply.⁵⁰⁴ Reasoning that the legislature intended that Song-Beverly supplement the UCC and that UCC Section 2-725 governs actions for breach of warranty of sales contracts, the court preferred the UCC provision over the general provisions of the California Code applicable to liabilities created by statute.⁵⁰⁵

The court then considered some usual Section 2-725 issues to which it applied a small dollop of Song-Beverly. Ordinarily, the sales cause of action accrues on tender of delivery, but there is an exception when a warranty extends explicitly to future performance.⁵⁰⁶ When does the exception apply? The warranty at issue was BMW's undertaking to repair the vehicle within thirty-six months of its purchase or during the first 36,000 miles of its use, whichever occurred first.⁵⁰⁷ BMW contended that this

was merely an agreement by the manufacturer to repair the vehicle, free of charge, during this period. It was not a warranty of future performance. . . . The warranty is given so as to allow

in this case, mandatory. CAL. CIV. CODE § 1794(d) (West Supp. 1993). The court did not discuss the provisions of § 1794(e)(1), which provide that a buyer who establishes a violation of a warrantor's repair or replace obligation under the motor vehicle lemon law provisions in § 1793.2(d)(2) is entitled to "recover damages and reasonable attorney fees and costs" as well as a civil penalty. The same result would presumably obtain despite the somewhat different language because there is still a requirement of reasonableness, a standard which the court also emphasized by quoting from CAL. CIV. PROC. CODE § 1033.5 (West 1985). *Levy*, 4 Cal. App. 4th at 813, 5 Cal. Rptr. 2d at 772.

500. *Levy*, 4 Cal. App. 4th at 813, 5 Cal. Rptr. 2d at 772 (quoting CAL. CIV. CODE § 1794(d) (West 1985)).

501. *Id.* at 814, 5 Cal. Rptr. 2d at 773.

502. *Id.* at 814-15, 5 Cal. Rptr. 2d at 773-74. The trial court had found the claim for \$137,000 in attorney fees not only "grossly exaggerated," but also, in a case in which damages totaled \$22,619.52, unconscionable. *Id.* at 812 n.1, 5 Cal. Rptr. 2d at 772 n.1.

503. 234 Cal. App. 3d 205, 285 Cal. Rptr. 717 (1991).

504. *Id.* at 211, 285 Cal. Rptr. at 720.

505. *Id.* at 212-13, 285 Cal. Rptr. at 722.

506. *Id.* at 214, 285 Cal. Rptr. at 722-23.

507. The exact language of the warranty was not set forth in the opinion.

the manufacturer to repair any problems with the vehicle without charge to the buyer. It is not provided for the purpose of allowing a buyer to extend the time he has to bring an action against the manufacturer, or an innocent retailer.⁵⁰⁸

As capsulized by the court, this amounts to a "position that [BMW] did not promise that its automobiles would perform satisfactorily during the warranty period. Instead, [BMW] claims that it only promised to repair any defects which occurred."⁵⁰⁹ This argument, which has prevailed in some jurisdictions,⁵¹⁰ received only short shrift from the California court. In its view, a promise to repair defects that occur during a future period "is the very definition of express warranty of future performance" both under the UCC and Song-Beverly.⁵¹¹ In support of this conclusion the court quoted the Song-Beverly definition of express warranty, which includes a "written statement . . . [in] which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in the utility or performance."⁵¹²

Because the warranty extends to future performance, the statute does not begin to run until discovery of the defect. On the facts of this case, it was appropriate to conclude that the cause of action accrued on the last date plaintiff had taken her car to the dealer and "determined that respondent has been unable to repair" it.⁵¹³ The court found this result consistent with the Song-Beverly policy that requires buyers to give the warrantor a reasonable opportunity to repair.⁵¹⁴ Moreover, using the date of the sale would undermine the legislative purpose that parties attempt to resolve problems before resorting to the remedies provided under the act.⁵¹⁵

Only one case has dealt with the specific automobile lemon law provisions that are an integral part of Song-Beverly. There the court noted that the general lemon rule of the Act⁵¹⁶ "establishes a substantive rule of general application—the manufacturer is obligated either to replace or

508. *Krieger*, 234 Cal. App. 3d at 217, 285 Cal. Rptr. at 724.

509. *Id.*

510. *See, e.g., Voth v. Chrysler Motor Corp.*, 218 Kan. 644, 648, 545 P.2d 371, 375 (1976) (holding automobile warranty against defects in material and workmanship to be warranty to repair or replace defective parts, not promise that vehicle would never malfunction).

511. *Krieger*, 234 Cal. App. at 217, 285 Cal. Rptr. at 724 (referring to U.C.C. § 2-313 and CAL. CIV. CODE §§ 1790-1790.4 (West 1985)).

512. *Id.* at 217, 285 Cal. Rptr. at 724 (quoting CAL. CIV. CODE § 1791.2 (West 1985)).

513. *Id.* at 218, 285 Cal. Rptr. at 725.

514. *Id.* (referring to CAL. CIV. CODE § 1793.2(d)(1) (West Supp. 1993)).

515. *Id.* at 218, 285 Cal. Rptr. at 725.

516. CAL. CIV. CODE § 1793.2(d) (West Supp. 1993).

to reimburse the buyer if 'the manufacturer or its representative in this state [are] unable to service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts.'"⁵¹⁷ The later-added automobile provisions provide "a pair of standards" applicable to new motor vehicles—"the vehicle is out of service for more than 30 calendar days, or the same problem has been the subject of at least four attempts at repair by 'the manufacturer or its agents.'"⁵¹⁸ They are, however, only "presumptive standards of what is 'reasonable.'"⁵¹⁹ They do not constitute a "per se, valid-in-all-circumstances, money-back guarantee" upon a showing of either factual circumstance.⁵²⁰ Replacement or reimbursement is still dependent upon a showing that there had been "a reasonable number of attempts" to conform the vehicle to the warranty.⁵²¹ On the other hand, "[u]nreasonableness may still be found even if a new vehicle has been out of service for less than 30 days or if there have been fewer than four attempts to repair the same problem."⁵²²

In determining whether the four-or-more repair standard has been satisfied, the manufacturer and its representatives in the state are treated "as a single entity, the repair efforts of both being aggregated for the purpose of calculating whether 'the same nonconformity has been subject to repair four or more times.'"⁵²³ Therefore, Ford, the defendant in the case, was not entitled to an additional opportunity to fix the vehicle. The court also found on the facts that Ford's owner's manual failed to give appropriate notice of Song-Beverly rights and obligations.⁵²⁴ Consequently, the consumer was excused from the requirement of giving direct notice to the manufacturer.⁵²⁵

The case includes a somewhat confusing discussion of the concept of nonconformity. One of plaintiff's contentions about jury instructions was that the word "defect" had been used instead of "nonconformity," a difference plaintiff considered prejudicial because the word invokes product liability notions that the product was unsafe in design or manufac-

517. *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 886, 263 Cal. Rptr. 64, 68 (1989) (quoting CAL. CIV. CODE § 1793.2(d) (West Supp. 1993)).

518. *Id.* at 886, 263 Cal. Rptr. at 68 (quoting CAL. CIV. CODE § 1793.2(e) (West 1985)).

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.*

523. *Id.* at 889, 263 Cal. Rptr. at 70.

524. *Id.* at 890, 263 Cal. Rptr. at 71. The obligation in question was that set forth in CAL. CIV. CODE § 1793.2(e)(1) (West 1985), which requires the buyer to give notice of breach to the manufacturer. This, however, is dependent on clear and conspicuous disclosure by the manufacturer of that obligation, which was not done in this case.

525. *Ibrahim*, 214 Cal. App. 3d at 891, 263 Cal. Rptr. at 71.

ture.⁵²⁶ Although conceding that it would have been better practice to use the statutory language "nonconformity," the court concluded that there was no harm in this case.⁵²⁷ In reaching this conclusion, the court found the Song-Beverly definition of "nonconformity" to be of "scant assistance: ' "nonconformity" means a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle.' . . . This definition is nothing more than a means of describing what the average person would understand to be a defect. The two words ["defect" and "nonconformity"] are in effect synonyms."⁵²⁸

The court's analysis is susceptible to misinterpretation. First of all, it did not explain that the nonconformity definition to which it referred applies only to the motor vehicle lemon law subsection of the Act. Secondly, the court's conclusion that there is no difference between a "defect" and a "nonconformity which substantially impairs the use, value or safety of the new motor vehicle" cannot be taken out of the context of the case. The court, without further explanation, noted briefly that another jury instruction provided the definition of "nonconformity" and in a footnote intimated that counsel for both sides in closing arguments had satisfactorily and consistently included the substantial impairment concept in conjunction with a discussion of defect.⁵²⁹ It would have been far clearer if the court had emphasized those matters more strongly. By not doing so, it left undiscussed the significance of the motor vehicle definition.

As indicated above in the discussion of the Song-Beverly Act,⁵³⁰ one of the purposes for enacting the repair, replace, or reimburse remedy was to overcome the cumbersome analysis under UCC Article 2, which requires, in a refund case, separate consideration of the doctrines of failure of essential purpose of a limited remedy and revocation of acceptance. The definition of "nonconformity" in the motor vehicle provisions goes a long way toward bringing back into the statute (for motor vehicles only) doctrine relating to revocation of acceptance in which substantial impairment of value is a statutory feature.⁵³¹ Clearly, then, where motor vehicles are concerned under Song-Beverly, there is considerable difference between "defect" and "nonconformity." For other products there may not be such a difference, although it seems likely that the drafters chose not to use the word "defect" in order to emphasize that express warran-

526. *Id.* at 887, 263 Cal. Rptr. at 68.

527. *Id.*

528. *Id.* (citation omitted).

529. *Id.* at 887 n.7, 263 Cal. Rptr. at 68 n.7.

530. See *supra* text accompanying note 169.

531. See U.C.C. § 2-608 (1989).

ties as defined in the Act are covered even though they may be carefully drafted to avoid use of that word.

In a case⁵³² treated as involving strict liability in tort, although other theories also had been submitted, the court spoke rather loosely about Song-Beverly in a way that might be interpreted erroneously to mean that the Act applies only to contracts involving express warranties.⁵³³ A close reading, however, shows that the court was addressing only the provisions of the statutory section⁵³⁴ that govern the obligations of retailers and distributors of *used* goods. The court concluded correctly that that section applies only when an express warranty is given.⁵³⁵ The court's conclusion that Song-Beverly does not affect an action in strict liability in tort is unexceptionable.

An unpublished federal district court opinion⁵³⁶ dismissed plaintiff's Song-Beverly claim in a case for failure to comply with the thirty day time period set forth in the section of the Act⁵³⁷ that deals with the specific problems of a consumer's return or claim for reimbursement for clothing and "consumables" covered by an *express* warranty. The court's conclusion is questionable. First of all, there is no indication in the decision that an express warranty was involved. Secondly, the return provisions neither foreclose in any way an action for damages for breach of express warranty nor make unavailable a claim for breach of the implied warranty of merchantability that arises under Section 1792 of the California Civil Code. Thus, the consumer should have been able to pursue a damage claim under Section 1794 based either on express or implied warranty. It is true, however, that the civil penalty provisions of the Act are not available for claims grounded only in implied war-

532. *Williams v. Volkswagen Aktiengesellschaft*, 180 Cal. App. 3d 1244, 226 Cal. Rptr. 306 (1986) (state reporter title: *Williams v. Volkswagenwerk Aktiengesellschaft*).

533. The court stated:

Nor does the Song-Beverly Consumer Warranty Act, section 1795.5 serve to impair Williams's remedies under strict liability/implied warranty theory. The section simply does not apply. It is clear on its face that the application is limited to sale contracts in general and only those involving express warranties in particular. Each paragraph is carefully written in terms of such limitation.

Id. at 1269, 226 Cal. Rptr. at 319.

534. CAL. CIV. CODE § 1795.5 (West 1985).

535. *Supra* note 533. The Act defines "consumer goods" to be *new* goods. CAL. CIV. CODE § 1795.5 in effect provides some limited exceptions when used goods are sold with an express warranty. Clearly the anti-disclaimer provisions of the Act are not confined to sales in which there are express warranties.

536. *Thompson v. Procter & Gamble Co.*, No. C-80-3711 EFL, 1982 WL *114 (N.D. Cal. Dec. 8, 1982) (applying California law).

537. *Id.* at *3 (discussing CAL. CIV. CODE § 1793.35 (West 1985)).

ranty,⁵³⁸ although attorney fees would be available under Section 1794(d). Clearly, though, the Act is not keyed to personal injury cases.

5. Oregon

Although the Oregon act is more comprehensive than those of the other copycat states, it is still a much stripped down version of Song-Beverly.⁵³⁹ Several Oregon cases illustrate shortcomings in the statute. In two of the cases, the dealer sold the consumer a product covered by the manufacturer's limited warranty and completely disclaimed any warranties of its own. In each case, the existence of the disclaimer was noted, almost in passing, with no discussion of whether it was subject to the statute's disclaimer provisions. Thus, in *Clark v. Ford Motor Co.*,⁵⁴⁰ the court simply observed that the consumer had signed a "Disclaimer Form" that identified the product and stated:

Any warranties on the vehicle sold hereby are those made by the manufacturer. The seller, Beaty Ford Merc, hereby expressly disclaims all warranties, either express or implied, including all implied warranties of merchantability or fitness for the particular purpose, and Beaty Ford Merc neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of the vehicle described hereon.⁵⁴¹

In the second case,⁵⁴² the court noted that "[p]laintiff also received and signed two documents by which Signer [Motors, Inc., the dealer] disclaimed all express and implied warranties."⁵⁴³ There was no other reference in the opinion either to the language or the circumstances of the disclaimer. In neither case did the court examine whether the disclaimers complied with the statutory requirements or whether, indeed, only a disclaimer of dealer warranties is contemplated by the statute. This problem is discussed in detail in Part II.

The same two cases also illustrate problems with the remedial—and lack of remedial—provisions in the Act. The Oregon statute follows the California pattern governing the warrantor's repair, replace, or refund obligations and the preservation of implied warranties,⁵⁴⁴ but it does not set forth a cause of action for violation of those obligations. The statute

538. CAL. CIV. CODE § 1794(c) (West 1985).

539. See *supra* text accompanying notes 130-33 and 191-98 for a discussion of some of the problems created by paring down the California act to "Oregon size."

540. 46 Or. App. 521, 612 P.2d 316 (1980).

541. *Id.* at 524, 612 P.2d at 317.

542. *Hanson v. Singer Motors*, 105 Or. App. 74, 803 P.2d 1207 (1990).

543. *Id.* at 76, 803 P.2d at 1208.

544. See CAL. CIV. CODE § 1793.2 (West Supp. 1993).

says merely that the remedies "provided" by the Act are "cumulative" and are not to be construed as restricting any other remedies, expressly including those available under UCC Article 2.⁵⁴⁵ That leaves a number of questions unanswered.

In *Clark*, the consumer asked for rescission and return of his down payment and monthly payments for an intractably rusty Bronco, on the UCC theory of revocation of acceptance and under the Oregon Consumer Warranty statutes.⁵⁴⁶ The court held that revocation was not available against the dealer because it had disclaimed all warranties, nor against the manufacturer because it did not sell the product to the consumer and "[a] buyer may revoke acceptance only as to his seller."⁵⁴⁷

Regarding the second claim, the court observed that although the Consumer Warranty Act provides "additional protection,"⁵⁴⁸ the consumer is entitled to look to the retailer "only if the manufacturer fails to maintain adequate service facilities in the state."⁵⁴⁹ Because there was no showing that Ford did not have such a facility, there was no statutory claim against the dealer.⁵⁵⁰ Since Ford was unwilling or unable to resolve the rust problem, it was in violation of its statutory obligation.⁵⁵¹ Ford, however, resisted recovery, arguing it had the option to replace or refund and that it had offered to replace.⁵⁵² The court said that, "Assuming, without deciding, that Ford has that option, the record shows that no offer to replace was ever made."⁵⁵³ Ford then argued that the consumer could not satisfy his statutory obligations to (a) return the vehicle to Ford because it had been repossessed and sold by the dealer, or (b) return it free of liens and encumbrances because it had been subject to the selling dealer's security interest.⁵⁵⁴

The court properly treated the arguments as literalistic and "mechanical." It observed that Ford could have resolved the security interest problem by making payment to the dealer so the lien could be

545. OR. REV. STAT. § 72.8190 (1973).

546. *Clark v. Ford Motor Co.*, 46 Or. App. 521, 525, 612 P.2d 316, 318 (1980). The court said also that "[p]laintiff also relies upon the Magnuson-Moss Warranty Act, 15 U.S.C. section 2304 *et seq.*, but we find that statute to be inapplicable to these facts." *Id.* at 525 n.2, 612 P.2d at 318 n.2. This is an inexplicable explanation.

547. *Id.* at 526, 612 P.2d at 319.

548. *Id.* at 527, 612 P.2d at 319.

549. *Id.* at 528, 612 P.2d at 319 (citing OR. REV. STAT. § 72.8110 (1973)).

550. *Id.*

551. OR. REV. STAT. § 72.8100(4) (1973).

552. *Clark*, 46 Or. App. at 528, 612 P.2d at 320.

553. *Id.* at 528, 612 P.2d at 320.

554. *Id.*

removed.⁵⁵⁵ It also treated the consumer's return of the vehicle to the dealer as a return to Ford because Ford had instructed the consumer to take it to the dealer for repairs.⁵⁵⁶ Finally, the court held that the burden of proof was on Ford to establish the value of the "beneficial use" deduction to which a warrantor is entitled when paying a refund.⁵⁵⁷

These holdings that (1) UCC revocation is not available against a disclaiming seller, (2) nor against a manufacturer (because not a seller),⁵⁵⁸ and (3) that a consumer could not proceed against a dealer under the Consumer Warranty Act because the manufacturer had adequate repair facilities in the state, were all confirmed in *Hanson v. Singer Motors*.⁵⁵⁹ In addition, the *Hanson* court held that the dealer could not be regarded as having given an express warranty under the Act simply for handing over the manufacturer's warranty.⁵⁶⁰ The most significant—and misleading—holding in the case is that the consumer had no Consumer Warranty Act claim against the manufacturer "because plaintiff did not prove 'substantial impairment in value.'"⁵⁶¹ This, of course, sounds as if the elements of a UCC claim for revocation of acceptance must be satisfied in an action under the Consumer Warranty Act. It is essential, however, to emphasize the court's footnote observation that "[b]oth parties argue the case under that standard. We are not asked to decide whether a showing of substantial impairment is necessary for recovery under the act, and we express no opinion on that issue."⁵⁶² There appears no basis whatsoever in the Act for such a requirement. Indeed, the statute flatly provides for replacement or reimbursement "if the manufacturer is unable to service or repair the good in compliance with each applicable warranty."⁵⁶³ Those strong remedies are not even conditioned on permitting the warrantor a "reasonable number of attempts," as in

555. *Id.* at 529-30, 612 P.2d at 320.

556. *Id.* at 529, 612 P.2d at 320.

557. *Id.* at 530, 612 P.2d at 320; see OR. REV. STAT. § 72.8100(4) (1973).

558. In *Hanson v. Singer Motors*, 105 Or. App. 74, 803 P.2d 1207 (1990), the court side-stepped the consumer's argument that the no-revocation rule should be changed in light of the Magnuson-Moss Act's conferral of a cause of action on a "supplier" by saying that consumer would lose even if revocation were available because he had not shown substantial impairment of value. *Id.* at 79, 803 P.2d at 1210. In *Gaha v. Taylor-Johnson Dodge, Inc.*, 53 Or. App. 471, 632 P.2d 483 (1981), the court found that a conclusion that a dealer was sufficiently an agent of the manufacturer, so that revocation was available against the manufacturer, was supported by a showing of some direct dealings with the manufacturer prior to sale and delivery by the manufacturer of the motor home to the dealer, with the expectation that the dealer would make the necessary modifications. *Id.* at 477, 632 P.2d at 486.

559. 105 Or. App. 74, 803 P.2d 1207 (1990).

560. *Id.* at 78, 803 P.2d at 1209.

561. *Id.* at 79, 803 P.2d at 1209.

562. *Id.* at 79 n.11, 803 P.2d at 1210 n.11.

563. OR. REV. STAT. § 72.8100(b)(4) (1973).

California.⁵⁶⁴ It should be noted that Oregon's motor vehicle lemon law does employ a substantial impairment test.⁵⁶⁵ But the *Hanson* court did not cite that statute, and it is not clear how that statute and the Consumer Warranty Act interact.

Even if a showing of "substantial impairment" were a condition of the strong remedy of refund or replacement, it surely should not be a complete bar to recovery of some damages under the Act. In this case, the camper-trailer was in various repair stations for a total of sixty-five days during the first six months of ownership.⁵⁶⁶ Apparently, the finding of no substantial impairment of value was rooted in the fact that most (but not all) of the defects had been fixed. But surely a consumer statute can be construed to provide *some* recovery on such facts.

Obviously, much of the blame in this case must rest on counsel for not framing a better argument. But the statute is also at fault for its complete silence regarding remedies. Also, although the statute requires that repairs be "commenced as soon as possible,"⁵⁶⁷ there is no requirement, as there is in California,⁵⁶⁸ that they be completed within any particular time. Moreover, the California remedy provisions give teeth to the requirement by providing a cause of action not only for breach of any warranty but also of "any obligation under this chapter."⁵⁶⁹

VIII. AN EVALUATION AND SOME CONCLUSIONS

It is clear that the special statutes illuminate some significant deficiencies in Article 2 provisions relating to disclaimers, remedies, and the obligations of distant warrantors, at least as they apply to consumer actions, and that they provide some tested models for overcoming them. It is also true that other developments—some of them originating in the special statutes—have both diluted their direct impact and obscured the need for Article 2 reforms in these areas. Evaluation, therefore, must address both the special statutes and at least some of the other developments.

A. *The Context for Evaluation: The Impact of Other Statutes*

Context is crucial to evaluation of these statutes.⁵⁷⁰ The statutes

564. CAL. CIV. CODE § 1793.2(d) (West 1985).

565. OR. REV. STAT. § 646.335 (1991).

566. *Hanson*, 105 Or. App. at 77, 803 P.2d at 1209.

567. OR. REV. STAT. § 72.8100(2) (1991).

568. CAL. CIV. CODE § 1793.2(b) (West Supp. 1993) (within 30 days).

569. *Id.* § 1794(a).

570. For a much broader context than that considered here, see the insightful analysis in

themselves simply do not tell the full story. During the early UCC years in which states were considering enactment, there was strong reluctance to make amendments out of concern that to do so would impair the goal of uniformity. Consumer advocates concentrated on trying to make the UCC work while waiting to see what would happen at the federal level. In the same time frame, substantial consumer advocacy resources gravitated to the newly exploding area of consumer credit and later to the drafting and implementation of state laws dealing with unfair and deceptive acts and practices (UDAP). And, after the Code had been in place for a number of years, the mindset for dealing with consumer sales law problems no longer contemplated the gargantuan task of amending Article 2. In addition, the evolution of federal and state legislation enacted after Article 2 obscured the pressing need for reform of sales law to deal with consumer issues.

The later legislation had several effects on the statutes considered here. The Magnuson-Moss Act borrowed from the state acts a few concepts⁵⁷¹ that helped alleviate some problems on a national basis and to that extent it helped to ward off some of the pressures that might otherwise have made the nonuniform state revisions more popular. But the Act and its regulations have a curious duality (some might say duplicity). On the one hand, the Act elevated implied warranty protection for consumers in many states by banning total disclaimers of the implied warranties (although permitting limitation to the duration of express warranties). On the other, the FTC made that standard the lowest common denominator for its rules regulating the disclosure of the contents of warranties⁵⁷² and permitted warrantor to leave consumers (and lawyers) uninformed—or misinformed—about the warranty and remedy rights available in states that afforded greater protection. Moreover, consumers in all states are left to ponder ambiguous boilerplate language that surely engenders more cynicism than comprehension. All of this may well have resulted in less use of the more protective statutes and thus further enlarged the circle of ignorance about them.

The state UDAP statutes and the newer motor vehicle lemon laws also have diverted attention from the kinds of problems these statutes have addressed. Both of these bodies of law have attracted—principally because of their superior remedies—litigation that otherwise would have

David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. REV. 1 (1985).

571. In particular, Magnuson-Moss borrowed the provisions which (1) prohibit total disclaimer of warranties if there is a written warranty and (2) authorize an award of attorney fees in breach of warranty cases.

572. See discussion *supra* part VI.

proceeded under the special legislation in these states and under Article 2 in the others. The laws thus have led to less use of the special statutes and helped obscure pressures for reform of general sales law.

The impact of the relatively recent lemon laws can be clearly identified. Consumers with motor vehicle and, to a lesser extent, mobile home problems have turned to this legislation because it provides much more specific rules and neater, cleaner, and easier roads to recovery with a much greater prospect for recovery of attorney fees and, in some states, multiple damages. It seems a fair guess that automobile and mobile home problems have accounted for a substantial percentage of consumer sales law cases litigated under Article 2. As a consequence of the lemon laws now in force in all of the states, and the mobile home laws in about one-third of them, those disputes most worth litigating—those involving problems during the first year of ownership of a consumer's most costly purchase—increasingly are moving out of the Article 2 pipeline. Indeed, the same pattern appears to be occurring in states with the special provisions considered here. This diversion of cases from general sales law also diverts attention from the need for Article 2 reform. Consumers' sales law problems, however, are not limited to first year ownership of automobiles and mobile homes!

Evaluation of the attempts to squeeze consumer sales warranty problems into formats suitable for litigation under UDAP acts is more complex and difficult. The temptation to use the legislation is clear. There is the hope of bypassing some of the sluggishness of sales law. Probably more compelling is the remedy pay-off. In some states, there are either mandatory or discretionary multipliers of damages. And, in some states, attorney fees are mandatory, while in others the standards for determining the availability of fees is more liberal to consumers than under the Magnuson-Moss Act. No clear patterns have appeared, however, and it is unlikely they will.

The world of UDAP acts is more diverse than that of lemon laws, both in terms of kinds of legislation and also in interpretation. As applied to sales law problems, that diversity ranges from total exclusion of routine sales disputes from coverage under a UDAP act to a statutory tie-in of breach of warranty. This rapidly evolving law is marked by uncertainty about scope and substance.⁵⁷³ The uncertainty exists not only because of the grapplings to give content to "unfair" and "deceptive,"

573. Less than a decade ago, Professor Stewart Macauley speculated about the possibility that the UDAP statutes might in time be a "Bambi" which, by inference, stood no chance against the Godzilla of classic contract law. Stewart Macauley, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 576 (1989). At the very least, if those

but also because of the problems of translating the standard administered by a federal administrative agency to one suitable for use in a private cause of action in the state courts. That is a large leap!

While the potential for application of the UDAP acts to sales law problems is uncertain, it is also great. As Professor Macauley has observed, "[s]ome of these statutes have overturned much of contracts' conventional wisdom."⁵⁷⁴ A strong example pertinent to consumer sales law is the interpretation that the parol evidence rule, although perhaps an impediment to establishing an express warranty, is irrelevant to a UDAP action rooted in oral misrepresentations.⁵⁷⁵ In the same vein are the cases that sidestep the UCC statute of limitations,⁵⁷⁶ merger clauses,⁵⁷⁷ and even disclaimers that comply with the formal requirements of Article 2.⁵⁷⁸ However, a general approach toward treating breach of contract as an unfair or deceptive trade practice has been very troublesome.⁵⁷⁹ This has been achieved in a few states by an express statutory tie-in.⁵⁸⁰ In many others, there appears a strong reluctance to transform a breach of contract into a UDAP violation. No doubt there is greater concern in those states in which the acts apply to commercial as well as consumer transactions.

Given these problems, it is not surprising that there is a sharp difference in the cases as to whether simple breach of warranty or a warrantor's failure to repair is "unfair" or "deceptive," or whether some sort of obdurate or unusual behavior is required.⁵⁸¹ Some courts clearly are concerned about the unbridled expansion of such actions under the increasingly large UDAP umbrella. In short, there is not only a very uneven application nationally of such laws to consumer sales law problems, but also there is a possibility of an eventual backlash that could undermine some of their beneficent features. Thus, they cannot seriously be

acts could ever be regarded as a Bambi, they must now be seen as a Bambi who has considerably bulked up—still smaller than Godzilla, but able to do a lot of damage.

574. *Id.* at 582-83.

575. See NATIONAL CONSUMER LAW CTR., *supra* note 16, § 4.2.15; PRIDGEN, *supra* note 14, § 3.04[5] n.30.5.

576. *State v. Bob Chambers Ford*, 522 A.2d 362, 364 (Me. 1987).

577. See NATIONAL CONSUMER LAW CTR., *supra* note 16, § 4.2.15.

578. *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604, 606-07 (Tex. Ct. App. 1985).

579. See PRIDGEN, *supra* note 14, §§ 3.04[5], 9.07[2]; Macauley, *supra* note 573, at 576.

580. *E.g.*, MASS. REG. CODE tit. 940, § 3.01 (construing MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 1992)); TEX. BUS. & COM. CODE ANN. § 17.44 (West 1987).

581. See NATIONAL CONSUMER LAW CTR., *supra* note 16, § 5.2.6; PRIDGEN, *supra* note 14, § 3.04[6].

regarded as providing very helpful answers on a national basis to consumer sales law problems.

B. The Nature of the Article 2 Deficiencies Disclosed by the Statutes

It is significant that the special statutes both have contributed to the evolution of these other bodies of law and also have survived them. If for no other reason, they deserve consideration because they have been in effect for more than two decades, and the case law construing them has not shown they have caused any significant problems. In the traditional American way, these states have experimented. The record shows that what might at first blush appear radical has not been so. Analysis of the provisions also shows pervasive state legislative concern about the adequacy of Article 2 to deal with important problems.

Some of the special statutory provisions operate on the premise that what is wrong with Article 2 for consumers is not its basic protection scheme but rather the authorization to depart from it. The disclaimer ban and some of the anti-remedy limitation rules fall into this category. Other provisions—especially those dealing with remedies—rest on conclusions that the Article 2 rules do not work well for consumers. Most of the special statutes reflect the view that the Article 2 remedy rules are too general to be useful in many consumer disputes and are, as a practical matter, unavailable because of the attorney fee problem.

Less uniformly addressed, but clearly evident in these statutes, is the attempt to do something about the failure of Article 2 to address the issues relating to the relationship between a distant warrantor and the buyer. Many make some provision for the direct liability of the warrantor to the consumer, as does the Magnuson-Moss Act.⁵⁸² A lesser number attempt to apply the ultimate liability concept to others in the chain of distribution by providing for indemnity to retailers and distributors.

Policing of the usual express warranty undertaking to repair or replace is another approach taken in some of the statutes, one that has caught fire in the motor vehicle and mobile home lemon laws. Several states also have required that manufacturers have substance behind their warranties by maintaining adequate service and repair facilities and by making information and parts available to independents.

582. Magnuson-Moss does not do the complete job, however, because it does not apply to oral express warranties, and the courts are split as to whether it confers standing to assert claims against distant warrantor for breach of implied warranty when such standing is not available under state law. See NATIONAL CONSUMER LAW CTR., *supra* note 213, § 33.7.4.

C. *Some Specifics*

1. Disclaimers

Taken as a whole, the disclaimer provisions in the special statutes speak strongly to reforming the disclaimer provisions of Article 2, at least for consumer transactions. The case law does not show any untoward results from the various rules, even those that make merchantability inviolate. Analysis does show that much care will be required for approaches that utilize less than a total ban. More importantly, these special statutes teach us that revision must also address both breadth and depth—policy, process, and format. Currently, Article 2 is strong only on format.

The legislation dealing with disclaimers differs from Article 2 in policy, process, and form. There are several different approaches. The most striking aspect of the Article 2 disclaimer provisions is that they have not stated the law accurately as it applies to consumer transactions since 1975 when the Magnuson-Moss Act became law. That Act, which was undoubtedly influenced by some of the special statutes, serves as a useful baseline for measuring them. It (1) prohibits complete disclaimer of merchantability where there is an express warranty, but (2) permits limitation of the duration of merchantability to that of the express warranty if conscionable and the duration of the express warranty is reasonable, and (3) permits states to provide additional protection.

Clearly, the strongest policy position on this issue in the special statutes is the complete prohibition against disclaimer of the implied warranties in the nine total ban states. This approach, although first enacted prior to Magnuson-Moss, survives the federal law as a form of additional protection permitted to the states. However, as indicated elsewhere, the Magnuson-Moss disclosure regulations probably have undercut the utility of the total ban by authorizing warrantor to obscure the existence of those rights.⁵⁸³ An additional problem is that the special statutes are not consistent in their application to manufacturers as well as retailers.⁵⁸⁴

The Song-Beverly states are influenced by the total ban approach, but, although providing more protection than Magnuson-Moss, they are qualified in important and uncertain ways. The disclaimer of implied warranties is governed by three principles: (1) if either new or used goods

583. See discussion *infra* Part VIII (D).

584. The difference in approach seems not so much a matter of conscious decision as oversight or the product of the mind-set of the early 1970s regarding suits against those not in privity.

are covered by an express warranty,⁵⁸⁵ the implied warranties may not be disclaimed; (2) the implied warranties may not be disclaimed in any sale of new goods not covered by express warranty unless there is compliance with an elaborate statutory formula which requires far more detailed communication to the consumer than Article 2; (3) the implied warranty of merchantability has a duration for purposes of the Act of no less than sixty days nor more than one year,⁵⁸⁶ and express warrantors may limit the duration of that implied warranty within those parameters.

These provisions differ from the Magnuson-Moss disclaimer rules in three ways. First, the Magnuson-Moss disclaimer ban does not apply to sales not covered by express warranties, while Song-Beverly does.⁵⁸⁷ Secondly, Magnuson-Moss goes further in the case of "full" warranties than Song-Beverly by prohibiting any limitation on the duration of merchantability.⁵⁸⁸ Finally, Song-Beverly puts numbers on the range of permissible limitation of duration of merchantability in an express warranty rather than leaving it to determination under the standard of conscionability.⁵⁸⁹

One of the strong points of Song-Beverly is that it clearly applies to manufacturers and others in the distribution process. Unfortunately, the abbreviated adoptions in some of the imitator states are rather vague about their reach.⁵⁹⁰ Some aspects of Song-Beverly are troublesome. Its unique approach of effectively prohibiting disclaimer of merchantability but compassing it with minimum and maximum limits is perhaps best explained by returning to the warranty situation that existed at the time it was drafted. At that time, the common practice of warrantors of consumer goods was to give express warranties and totally disclaim all implied warranties. One consequence was that there was little or no law determining how long the implied warranty of merchantability persisted. Undoubtedly, when consideration was being given to prohibiting disclaimers of merchantability, warrantors were concerned about how the merchantability concept that they previously had avoided would apply. The selection of finite numbers thus served the goal of providing minimal consumer quality protection without exposing warrantors to the risk that the concept of merchantability would be stretched beyond what the warrantor may consider an unreasonably long period of time. Moreover, the

585. "Express Warranty" is defined in the Act more narrowly than under Magnuson-Moss or the UCC. See *supra* text accompanying note 149.

586. In the case of used goods, the periods are reduced to 30 days and three months.

587. See *supra* text accompanying note 120.

588. See *supra* text accompanying note 125.

589. See *supra* text accompanying note 122.

590. See *supra* text accompanying notes 117-19.

selection of specific numbers kept uncertainty within defined limits. There are, however, countervailing problems that outweigh those benefits.

From a consumer perspective, the strongest objection is that both the minimum and maximum time periods are too short for many—perhaps most—consumer products. There are several lawyer problems. The interrelationship with Magnuson-Moss is probably the most puzzling. For example, assume a two-year express warranty. Under Magnuson-Moss, the minimum duration of merchantability is two years. Under Song-Beverly, the maximum duration is one year. Assume an express warranty of thirty days. Under Magnuson-Moss, the duration of merchantability would be thirty days if such a limited duration were conscionable, and if the duration of the express warranty were reasonable. Under Song-Beverly, the duration of merchantability would be sixty days. To further complicate matters, it is conceivable that a limitation of duration effective under Song-Beverly (within the statutory time parameters) would not be effective under Article 2 to limit the UCC implied warranty of merchantability. As if all of this were not complicated enough, the Magnuson-Moss disclosure rules permit the warrantor to communicate in Magnuson-Moss terms and ignore the specifics of Song-Beverly. The benefits are blurred by the burdens.⁵⁹¹ From any perspective, Song-Beverly is another example of strong dissatisfaction with the disclaimer provisions of Article 2.

Concern about disclaimers is expressed in other states in ways that affect both process and format. The Washington statute focuses on the process leading up to disclaimer, requiring that it be “explicitly negotiated.”⁵⁹² South Carolina, hearkening back to the 1944 proposed Revised Uniform Sales Act and the early versions of the UCC,⁵⁹³ requires specificity.⁵⁹⁴ Several others confine “as is” disclaimers essentially to use with defective goods.⁵⁹⁵ All five states in the Song-Beverly group condition disclaimer of the implied warranties on compliance with a ritualistic formula, going far beyond Section 2-316, to convey a strong message of transfer of risk.⁵⁹⁶ It is also notable that West Virginia, in banning disclaimers of both implied and express warranties, may have overcome,

591. The other states did not address the issue of limitation when adopting shorter versions, with the consequence that some may be construed to preclude it. There is no helpful case law on the issue.

592. See *supra* note 400 and accompanying text.

593. The drafting history is briefly set forth in HONNOLD & REITZ, *supra* note 86, at 109-10.

594. S.C. CODE ANN. § 36-2-316(2) (Law Co-op 1976).

595. See, e.g., *supra* notes 91-94 and accompanying text.

596. See *supra* notes 95-103 and accompanying text.

without even trying to resolve, the problem of a merger clause leveraged with the parol evidence rule to exclude parol express warranties.⁵⁹⁷ As indicated above, the parol evidence and merger issues have been considered in some other states under unfair and deceptive trade practices statutes.

2. Remedies for Breach of Express and Implied Warranties

One of the strongest messages conveyed by the very existence of these special statutes—as augmented by the motor vehicle and mobile home lemon laws—is that the Article 2 remedy provisions do not work well in the consumer context. The special statutes illustrate strong concern about (1) permitting warrantors to limit remedies and exclude consequential damages; (2) the flabbiness of the Article 2 rules governing the consequences of not remedying defects; (3) policing of express warranty obligations; and (4) availability of attorney fees.

a. The ban on remedy limitations and exclusions of consequential damages

The approach to remedy problems in the total ban states is simple and generic: With only a very few exceptions, the warrantor may not limit remedies for breach of implied, and sometimes also of express, warranties.⁵⁹⁸ In at least five of the states, the prohibitions apply to both manufacturers and retailers, and the statutes in several others can be so construed.⁵⁹⁹

The most commonly used provisions in current warranties that should be invalid under these bans are the ubiquitous clauses which limit remedies to repair or replacement and exclude consequential damages. No doubt the drafters of that day also had in mind provisions like those classics which limited the repair obligation to those parts of the warranted product (for example, automobile or furnace) that were returned to the factory at the expense of the consumer.⁶⁰⁰

597. See W. VA. CODE § 46A-6-107 (1992). Only West Virginia chose to follow the NATIONAL CONSUMER ACT § 3.302(1) (1970) on this point. See *supra* text accompanying note 43.

598. See *supra* notes 23-24 and accompanying text.

599. See *supra* notes 54-58 and accompanying text.

600. Probably the most well-known example is the warranty in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which provided in part:

The manufacturer warrants each new motor vehicle . . . to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur,

Given the potentially broad sweep of the statutes, it is surprising that there is relatively little caselaw dealing with remedy limitations. There are certainly enough cases to show the possibilities, such as the invalidity of a variety of clauses ranging from "as is" to "50-50" warranties in which the buyer is to pay half the cost of repairs and attempts to confine consumers to claims against distant component suppliers.⁶⁰¹ Moreover, the case law does not hint at any pervasive problems caused by the bans.

Although exclusions or limitations of consequential damages seem doomed in both the total ban and the Song-Beverly states,⁶⁰² the case law contains virtually no reference to the issue. This absence of litigation probably can be explained by the fact that such exclusions routinely are circumvented in consumer cases, even in non-total ban states, when defects have been serious enough to warrant application of the Article 2 "dynamic duo" of failure of essential purpose and revocation of acceptance.⁶⁰³ All of this would appear to support a provision that banned such clauses in consumer transactions.

b. Contending with the failure of failure of essential purpose

The Song-Beverly elevation of repair, replacement, or restitution to statutory obligation presents a sharp contrast to the total ban approach. In essence, it assumes the existence of the repair or replacement clause and enhances Article 2 remedies for its breach. Its improvement over the Article 2 pattern has been to collapse into a single test the two rather generic and unformatted tests of failure of essential purpose of a limited remedy (usually of repair or replacement) and revocation of acceptance.⁶⁰⁴ This has evolved through the full warranty lemon-aid provisions of Magnuson-Moss to even more specific form in the current motor vehicle lemon laws. Thus, although some other features of Song-Beverly

be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

Id. at 367, 161 A.2d at 74.

601. See *supra* text accompanying notes 25-29.

602. Under the damages provisions in CAL. CIV. CODE § 1794 (West 1985), there is a cross reference to the appropriate damage sections of UCC Article 2 other than § 2-719 in which appears the authorization to limit remedies to repair and replacement and limit consequential damages. CAL. CIV. CODE § 1794(b) (West 1985).

603. Many of the consumer cases simply ignore the issue of whether there should be an analysis of unconscionability of the exclusion. See *supra* note 42.

604. As already indicated, a third inquiry under § 2-719, whether an exclusion of consequential damages is unconscionable, generally has been ignored in consumer cases.

have been followed in only a few jurisdictions, these appear in virtually every jurisdiction in the specific context of motor vehicle and motor home lemon laws.

In view of the flush of success of the lemon laws, it is tempting to conclude that their approach to remedies could be applied across the board to consumer products. A word of caution, however, seems in order. The lemon law remedies implemented in the motor vehicle and mobile home statutes were designed to deal with expensive and complex products that consumers reasonably expect may require some repair even when brand new,⁶⁰⁵ and which usually can be and are repaired locally and quickly. The case may be different for products that are both less complex and less expensive. Ordinarily it is expected that simpler goods are ready to go and will not need adjustments. Moreover, most simple goods are in a price range in which repairs often are not economically efficient, and the warrantor does not maintain local servicing facilities. In those cases, the warrantor's promise of repair is hollow when it is conditioned on the consumer not only incurring the expense of shipping but also paying a "handling" fee, which in some instances approaches or exceeds the price of the item. Giving the warrantor a "reasonable number of attempts" for such a product with such fees would, as a practical matter, be only a marginal improvement over the current Article 2. The ban on remedy limitations seems more appropriate.

Song-Beverly attempts to cope with these kinds of problems by means of provisions designed to police the repair process. The manufacturer is required to have sufficient and reasonably close repair facilities and, ordinarily, to complete repairs within thirty days. If the manufacturer does not maintain such facilities, the statute enlists the services of those in the distributive chain and even independent repairers, whom the manufacturer is then obliged to indemnify. In addition, the manufacturer is obliged to provide adequate literature and parts.⁶⁰⁶

These Song-Beverly features were simplified greatly in the imitator states, leaving only vestiges of requirements that manufacturers maintain

605. As Professor Whitford has said,

Such a high percentage of new cars require some repair early in their life [sic] that it is totally unrealistic to say that the manufacturers promise their products will not contain defects. Certainly the manufacturers themselves view the express warranty as a promise to repair defects rather than a promise that there will be no defects. If the express new car warranty is viewed as a promise to repair or replace defective parts, then it can be said that there is no breach of promise, and certainly no material breach, until the dealer demonstrates his inability or unwillingness to repair a defect.

William C. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 157-58.

606. See *supra* text accompanying notes 156-63.

or provide sufficient repair facilities. An even more abbreviated and diluted requirement appears in some of the total ban states.⁶⁰⁷ Of all the special statutory provisions considered, this approach has been enacted by the fewest statutes. Moreover, the subject matter seems the most distant from general sales law and perhaps the least appropriate for inclusion in a revised Article 2. Indeed, there is clearly room, even without express provisions like those in Song-Beverly, for application of little FTC acts to some of these problems.⁶⁰⁸

California also apparently stands alone regarding statutory efforts to cope with the problems of shifting to consumers the costs of shipping and repairing (in the form of variously labeled fees). This may well be one of the most significant areas unexplored by other state legislatures. Indeed, it is surprising that questions regarding such practices have not been litigated more under the special statutes.⁶⁰⁹ It is hard to distinguish such charges from the kind of cost-sharing warranty that has been found to violate a remedy limitation ban.⁶¹⁰ Such charges might also be considered inconsistent with prohibitions against disclaimers of merchantability, although no cases have taken that approach.

607. For example, the prohibition against limitation of remedies for breach of express warranties applies unless the manufacturer provides "reasonable and expeditious means of performing warranty obligations." See MD. CODE ANN., COM. LAW I § 2-316.1(3) (1992). One disadvantage of this approach is that litigation may be necessary to determine the adequacy of the facilities in order to learn whether a remedy limitation is effective.

608. See, e.g., *Louisiana ex rel. Guste v. Fedders Corp.*, 543 F. Supp. 1022, 1024 (M.D. La. 1982) (affirming that Louisiana was not preempted from prosecuting state law claim for unfair and deceptive trade practices by fact that FTC already had prosecuted manufacturer). For an analysis that it is both unfair and deceptive for a warrantor not to provide adequate facilities for service and repair, see BUREAU OF CONSUMER PROTECTION, *MOBILE HOME SALES AND SERVICE: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION* 421-46 (Aug. 1980). The Federal Trade Commission Guide for Advertising of Warranties and Guarantees provides that goods should be advertised as warranted only if the seller or manufacturer "promptly and fully performs its obligations under the warranty or guarantee." 16 C.F.R. § 239.5 (1992).

609. There has been some significant litigation on this issue under the New York motor vehicle lemon law. In *State by Abrams v. Ford Motor Co.*, 74 N.Y.2d 495, 503, 548 N.E.2d 906, 911, 549 N.Y.S.2d 368, 373 (1989), the New York Court of Appeals approved (a) a permanent injunction enjoining Ford from requiring its customers to pay the first \$100 of repairs under its extended powertrain warranty during the 18,000-mile or two-year period of the New York lemon statute, and (b) an order for restitution pursuant to a New York statute authorizing that remedy where a person has engaged in repeated fraudulent or illegal acts or has otherwise demonstrated persistent fraud or illegality in carrying on a business. The charge was found to be in violation of the New York lemon law requirement that if the vehicle "does not conform to all express warranties for the earlier of its first two years or 18,000 miles, '[t]he manufacturer . . . shall correct said nonconformity . . . at no charge to the consumer.'" *Id.* at 500, 548 N.E.2d at 909, 549 N.Y.S.2d at 371 (quoting N.Y. GEN. BUS. LAW § 198-a(b)(1) (McKinney 1992)). Although the provision is technically not a ban against disclaimers or limitations on remedies, it is at the very least analogous.

610. See *supra* text accompanying note 28.

3. Attorney Fees and Sanctions

A common feature of most of the special statutes is provision for attorney fees. Now that this is a feature of federal law under Magnuson-Moss, the need for specific provisions in a revised Article 2 is clearly less compelling than it was before that Act. An Article 2 without such a provision, however, remains an inaccurate statement of the law. There is, moreover, room for consideration of drafting a different standard. These statutes, as well as the little FTC acts, provide several different models. Some of the statutes also provide for sanctions; that is, some penalty not measured by actual damages. This approach clearly would be an exception to the general expectations measure of damages set out in Article 2 and underscored in Section 1-106. However, there is already precedent for this kind of exception in Section 9-507(1). One problem regarding sanctions may be noted. In a few states, a sanction is available theoretically for drafting a form with a prohibited disclaimer or limitation. The lack of cases on this point probably indicates that those provisions have been vitiated by the Magnuson-Moss disclosure regulations that permit a warrantor to bury state law rights under meaningless boilerplate. As a matter of public policy, such conduct should surely be within the realm of unfair and deceptive practices. Many undoubtedly would regard it more suitably addressed there than in Article 2. It is, however, an issue that demands more response than it has received.

4. Bringing Distant Warrantors Under the Law

It is remarkable that Article 2 does not on its face even apply to transactions between a consumer and a distant warrantor that is not the consumer's "seller." The special statutes demonstrate several tested ways to deal with this monumental shortcoming. These include applying disclaimer and limitation bans to manufacturers as well as retailers, requiring distant warrantors to indemnify immediate sellers, and conferring standing on consumers to obtain remedies directly from the distant warrantor. There are many details to work out, but these statutes and the lemon laws are testament that the task can be done and that the results will not clog the wheels of commerce. Moreover, it should not be thought that the task is beyond the contemplation of those who drafted Article 2. Section 121 of the Uniform Revised Sales Act, drafted by Karl Llewellyn, conferred a direct right of action against the party ultimately responsible for breach of warranty.⁶¹¹

611. UNIFORM REVISED SALES ACT § 121 (Proposed Final Draft No. 1) (1944) provided: DIRECT ACTION AGAINST PRIOR SELLER. Damages from breach of a warranty sustained by the buyer or by any beneficiary to whom the warranty extends under Sec-

D. Amending the Disclosure Regulations of Magnuson-Moss

One last sad parting word need be said about the disclosure regulations of Magnuson-Moss. As indicated in numerous places in this Article, the Federal Trade Commission has authorized warrantors to write warranties at the level of the lowest common denominator of consumer rights and use them even in states whose legislatures have provided for greater rights. This is permitted so long as the warranty concludes with this printed epitaph: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state." Since the effectiveness of remedies rests in large measure on knowledge of rights,⁶¹² it is hard to avoid the conclusion that this regulation has vitiated to an unknown extent many of these special state laws.

This long-standing interpretation is not mandated by the Act. Indeed, one subsection provides expressly that "[n]othing in this [Act] shall invalidate or restrict any right or remedy of any consumer under State Law."⁶¹³ Moreover, in 1977, the Commission rejected the contention that the purpose of the Act "was to preserve uniformity of warranties—i.e., to ensure that nationwide manufacturer-warrantors would not have to comply with a multiplicity of State laws on the subject," and insisted that Congress had rejected the idea of uniformity of warranties either as "the major purpose" or a "predominant goal" of the Act.⁶¹⁴ The regulations should be changed so that consumers will not have to read state statutes to learn that their warranties are not as limited as they say.

I have heard it said that it is easier to get all the individual state legislatures to amend the UCC in order to effect change than it is to get

tion 43 may be recovered in a direct action against the seller or any person subject to impleader under Section 120. An action against one warrantor does not of itself bar action against another.

Id. The commentary further explained:

Section 121 on *direct action* follows the established line of cases which . . . have worked out avoidance of hardship and expense by allowing immediate suit against a party more remotely, or ultimately, responsible. . . . Without depriving the plaintiff of a local remedy, at his choice (with Section 120 and its policy on voucher both available to protect the local seller) Section 121 makes possible a simplification and cheapening of the remedy, recognizing at the same time the practice of manufactures [sic] to protect their distributors by taking over the defense of such an action.

Id. § 43 cmt., at 154.

612. Failure to provide a meaningful compensatory damages remedy in consumer cases "may be attributed, for the most part, to two principal factors, the lack of knowledge by the consumer of his legal rights and the prohibitive cost of litigation." David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559, 567 (1968).

613. 15 U.S.C. § 2311(b)(1) (1988).

614. 42 Fed. Reg. 54,006 (1977).

(and trust) Congress to act in areas of private law. One would hope the same would not be true of the FTC, but this particular provision (which a colleague once described beautifully as “one of history’s more timid exercises of authority”)⁶¹⁵ has survived for almost two decades. At the very least, it ought to be possible to induce the Commission to act if the Revised Article 2 raised the lowest common denominator.

615. 2 RICHARD M. SMITH & DONALD F. CLIFFORD, NORTH CAROLINA PRACTICE: UNIFORM COMMERCIAL CODE FORMS ANNOTATED 150 (Supp. 1977).

